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SUPREME COURT, U.S.

Vol. I

TRANSCRIPT OF RECORD

(Pages 1 to 327)

Supreme Court of the United States

OCTOBER TERM, 1952

No. 330

ESSO STANDARD OIL, APPELLANT,

vs.

JAMES CLARENCE EVANS, COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE, ET AL.

No. 378

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

JAMES CLARENCE EVANS, COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE, ET AL.

APPEALS FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

No. 330—FILED SEPTEMBER 11, 1952
No. 378—FILED OCTOBER 6, 1952
Probable Jurisdiction Noted November 10, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

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APPEALS FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

VOL. I

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[fol. 255] IN SUPREME COURT OF TENNESSEE

Davidson Equity

ESSO STANDARD OIL COMPANY

v.

JAMES CLARENCE EVANS, Commr., etc.

OPINION—

The bill in this cause was filed to recover certain gasoline taxes paid under protest by the Complainant on demand of the Defendant. In the Chancery Court, because certain governmental immunity was asserted, the Chancellor permitted the United States Government to file an intervening petition. For brevity and to conform with the method adopted by the parties, we will refer, in this opinion, to the Complainant as "Esso;" to the Defendant as "State;" and to the intervenor as the "United States."

The controversy rises out of services performed by Esso for the United States under written contracts which are exhibited. These contracts between the United States and [fol. 256] Esso contained indemnifying clauses which provide for payment by the United States of any state taxes for which Esso may be made liable on account of its activities under the contracts.

During the war years the United States was purchasing at the refineries, all 100-octane and higher octane gasoline used in aviation. From the refineries, the gas was moved, usually by common carrier, and principally by river barge, to various storage points. The United States had no storage facilities nor personnel to store and handle the gasoline, and for these services contracted with private corporations.

Esso owned certain storage tanks at Memphis, and rented others from the Lion Oil Company, and then contracted with United States to store the aviation gasoline belonging to the United States, in these tanks, and with Esso personnel to distribute the gas from these tanks on order of the United States.

The gasoline came up the Mississippi River by barge from Louisiana, where it had been purchased by the United States. When it arrived at Memphis, and while it was still on the barges, it was inspected by State officers, and there-

after pumped by Esso from the barges into its storage tanks, or in some cases, into tank trucks, and thereafter delivered to various Army posts on order of the United States. Some of these Army posts were in Tennessee, and others were in Arkansas and Mississippi.

[fol. 257] Activity under the contracts here involved, commenced in 1943, and continued through the years 1944, 1945 and 1946. Since the Statute of Limitations had run on any taxes which accrued for the year 1943, the present suit was filed to recover taxes in the amount of $295,810.10, which had been paid under protest for the month of January 1944, after the State had prepared a distress warrant and threatened to have it served. It is agreed that the present suit is a test case, and will determine liability for taxes for the balance of the year 1944, and for the years 1945 and 1946. During the years when the contracts were in operation and Esso was rendering its services to the United States, inspection reports were rendered the Department of Finance and Taxation, and discussions were had with the State regarding tax liability. No formal decision of such liability was ever made, either by the then Commissioner, or by the Attorney General. Esso insists that it relied on the contemporaneous and continued administrative construction of the then officers of the State, and that they concluded that Esso was not liable for any gasoline taxes in connection with the gasoline of the United States upon which Esso was rendering services under its contracts. The State, on the other hand, insists that the matter of liability was held in abeyance and was uncertain, and that Esso was never formally advised by any responsible authority, that it was not liable for these taxes.

Under the contracts, Esso received as compensation, amounts ranging from 18/100 of a cent to 6 3/10 cents a [fol. 258] gallon for receiving and storing in its own facilities and those leased from others, the gasoline belonging to the United States. Also it received varying amounts for gasoline distributed by its own facilities, or delivered to carriers on order of the United States.

From this, we conclude that the questions presented for decision by this litigation are three, namely:

(1) On the facts stated, was Esso liable for inspection fees under Code sec. 6821?

(2) Was Esso liable for privilege tax for such operations under Code sec. 1126.1, et seq.?

(3) Was Esso liable for interest and penalties?

The Chancellor held that Esso was not liable for (1) and (3), but was liable for (2), and from those parts of the decree which were adverse, all parties have perfected appeals.

We consider first, the question of liability of Esso under Code sec. 6821, for the inspection fees. That section provides that every consignment of volatile substances, as such substances, are defined in previous sections of the Code, shall be inspected, and for such inspection, a charge shall [fol. 259] be made to "the consignor or consignee," of 20 cents a barrel. Fifty gallons shall constitute a barrel, and the full charge made for any fraction of such barrel.

That this inspection fee is not merely a service charge, but is a revenue measure and an excise tax on the commodity, has been held in a number of our reported cases. State, ex rel Fort vs. City of Jackson, 172 Tenn., 119; Texas Co. vs. McCanless, 177 Tenn., 238.

From Judge Cook's discussion of the nature of the tax and its purpose in State vs. Reed Oil Co., 176 Tenn., 10, 19-20, it is clear that the tax is laid upon the commodity itself, as an excise. In the present case, the gasoline, while it was in the barges on the river, and also while it was in the storage tanks on the bank, was admittedly the property of the United States. The inspections were made before the contract of Esso came into play, and before Esso had pumped the gasoline from the barge into its storage tanks. We, therefore, agree with the Chancellor, that the State has no power to levy a tax on property of the United States under these admitted facts.

We come next to the consideration of the second question, and Esso's liability for the privilege tax under Code secs. 1126, et seq. This privilege tax has also been defined by reported decisions of this Court.

[fol. 260] "This case (Foster & Creighton Co. vs. Graham, 154 Tenn., 412) . . . settled the proposition that the tax . . . is a privilege tax on the engaging in the business of storing gasoline based on the

Complainant's Exhibits—Continued	Original	Print
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No. 57—Letter from R. L. Weakley to Standard Oil Company of Louisiana dated October 29, 1943	882	460
No. 58—Letter from R. L. Weakley to Standard Oil Company of Louisiana dated October 29, 1943 with Exhibits A-F attached	883	461
No. 59—Letter from Standard Oil Company of Louisiana to State of Tennessee dated December 30, 1943	891	469
No. 60 & 61—Letter from J. C. Greene to Standard Oil Company of Louisiana dated March 29, 1943 and reply dated April 6, 1943	892	470
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No. 1—Fixed price service contract No. W-33-038 ac-1689 and Change Order No. 1 and Supplemental Agreement No. 2 between the government and River Petroleum for the period November 1, 1943 thru June 30, 1944 for transportation, storage, handling and delivery of government-owned aircraft engine fuel	895	472
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No. 5—Letter from W. F. Barry to Commissioner Evans dated October 28, 1949	918	497
No. 6—Letter from Commissioner Evans to W. F. Barry dated October 26, 1949	920	499

[fol. 1]

IN THE SUPREME COURT OF THE STATE OF TENNESSEE

Davidson Equity

ESSO STANDARD OIL COMPANY, Complainant-Appellant

v.

JAMES CLARENCE EVANS, Commissioner, Etc., Defendant-Appellee.

STIPULATION AS TO RECORD—Filed August 8, 1952

The parties to the above entitled cause stipulate as follows with respect to the portions of the record to be omitted from the transcript transmitted to the Supreme Court:

Complainant's Exhibits 4-28 inclusive, 40-45 inclusive, 47, 48, 50-53 inclusive, 56 and 62-66 inclusive shall be omitted for the reason that some are already copied in the testimony and the descriptions of the others in the testimony of the witnesses are substantially correct, so that their inclusion, verbatim, would be unnecessary to a proper presentation of the case on appeal. It is stipulated that title to the gasoline here involved became vested in the United States at the refineries and remained in the United States at all times thereafter and that such gasoline was transported on government bills of lading by common carrier barges to the bank of the Mississippi River at Memphis. [fol. 2] For that additional reason such of the foregoing exhibits as were introduced to prove said facts are unnecessary to a proper presentation of the case on appeal.

There shall also be omitted the depositions of Joe Holbrook, T. B. Bunn and William Waller (pp. 216-228) and the rebuttal deposition of R. L. Weakley (pp. 355-360), same being unnecessary to a proper presentation of the case on appeal. The deposition of R. L. Weakley (pp. 306-339) and pp. 248-263 will follow the deposition of Cicero C. Cessions (pp. 206-215) and will be copied in the order in which the testimony was taken rather than the order in which it was filed.

1—330, 338

There will also be omitted the cost bond, subpoena to answer; appeal bond; certificate of Clerk & Master and bill of costs.

With the foregoing exceptions, the entire record shall be included in the transcript, including this stipulation.

This August 9, 1952.

/s/ William Waller, Counsel for Appellant; /s/ Walker & Hooker, by K. Harlan Dodson, Jr., Counsel for Appellee.

[fol. 3] Order directing transmittal of original exhibits to Supreme Court (omitted in printing).

[fol. 4] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

PETITION FOR APPEAL—Filed August 8, 1952

To the Honorable A. B. Neil, Chief Justice of the Supreme Court of the State of Tennessee:

Considering itself aggrieved by the final decree and judgment of this Court entered June 7, 1952, and order denying petition for rehearing entered July 11, 1952, Esso Standard Oil Company, complainant-appellant, does hereby pray that an appeal be allowed to the Supreme Court of the United States from said final decree and judgment and order denying the petition for rehearing and from each and every part thereof; that citation be issued in accordance with law; that an order be entered with respect to the appeal bond to be given by said complainant-appellant; and that the material parts of the record, proceedings and papers upon which said final judgment and decree and order denying petition for rehearing were based, duly authenticated, be sent to the Supreme Court of the United States in accord-
[fol. 5] ance with the rules in such cases made and provided.

Respectfully submitted, William Waller, Counsel for Complainant-Appellant, Esso Standard Oil Company, American Trust Building, Nashville 3, Tennessee.

[fol. 6] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

ORDER ALLOWING APPEAL—Filed August 8, 1952

Esso Standard Oil Company, complainant-appellant, having made and filed its petition praying for an appeal to the Supreme Court of the United States from the final judgment and decree of this Court in this cause entered June 7, 1952, and order denying petition for rehearing entered July 11, 1952, and from each and every part thereof, and having presented its assignment of errors and prayer for reversal and its statement as to the jurisdiction of the Supreme Court of the United States on appeal, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

Now, therefore, it is hereby ordered that said appeal be and the same is hereby allowed as prayed for.

[fol. 7] It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of $1,000.00 with good and sufficient surety, and shall be conditioned as may be required by law.

It is further ordered that citation shall issue in accordance with law.

A. B. Neil, Chief Justice.

August 8, 1952.

[fol. 8] Bond on appeal for $1,000.00 approved and filed August 8, 1952, omitted in printing.

[fols. 9-10] Citation in usual form showing service on K. Harlan Dodson, Jr., omitted in printing.

[fol. 11] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed August 8, 1952

Esso Standard Oil Company, complainant-appellant in the above cause, in connection with its appeal to the Supreme Court of the United States, hereby files the following assignment of errors upon which it will rely in its prosecution of said appeal from the final judgment and decree of the Supreme Court of Tennessee entered June 7, 1952, and order denying petition for rehearing entered July 11, 1952.

The Supreme Court of Tennessee erred as follows:

1. Having construed the Tennessee gasoline tax laws (secs. 1126 et seq. of the Code of Tennessee (1932) as amended) as requiring the inclusion in the measure of Esso Standard Oil Company's gasoline tax of gasoline belonging [fol. 12] exclusively to the United States, the Court erred in not holding that, as so construed and applied, said Tennessee gasoline tax laws are repugnant to the Constitution of the United States and void under the principle of implied constitutional immunity.

2. The Court erred in failing to hold that the assessment to Esso Standard Oil Company, for the purposes of said Tennessee gasoline tax laws, of gasoline belonging exclusively to the United States, by including the quantity of such gasoline in the measure of the tax assessed, is illegal and void for the reason that such assessment is upon or measured by the exclusive property of the United States, which is immune from taxation by the State of Tennessee under the Constitution of the United States.

3. Having construed said Tennessee gasoline tax laws as requiring the inclusion in the measure of Esso Standard Oil Company's gasoline tax of gasoline belonging exclusively to the United States, which was the property of the United States when it came to rest in the State of Tennessee, and having at the same time adhered to its decision in Tennessee Oil Company v. Commissioner, 178 Tenn. 683, 157 S. W. 2d

267, construing said laws as not requiring the inclusion in a gasoline distributor's gasoline tax of gasoline stored and handled by such distributor which did not belong to it when it came to rest in the State of Tennessee, the Court erred in not holding that, as so construed and applied, the Tennessee gasoline tax laws are repugnant to the Fourteenth Amendment to the Constitution of the United States, and void as denying to Esso Standard Oil Company the equal protection of the laws for the reason that the classification made by said laws, as so construed and applied, is arbitrary and [fol. 13] without reasonable or substantial basis.

4. The Court erred in failing to hold that the assessment to Esso Standard Oil Company, for the purposes of the Tennessee gasoline tax laws, of gasoline belonging exclusively to the United States, which was the property of the United States when it came to rest in the State of Tennessee, by including the quantity of such gasoline in the measure of the tax assessed, is illegal and void, for the reason that such assessment denies to Esso Standard Oil Company the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, in that the Court, in upholding such assessment, adhered to the construction placed upon said laws in Tennessee Oil Company v. Commissioner, 178 Tenn. 683, 157 S. W. 2d 267, and the classification made by said laws, as so construed and applied, is arbitrary and without reasonable or substantial basis.

Wherefore, complainant-appellant, Esso Standard Oil Company, prays that the judgment of the Supreme Court of Tennessee be reversed, and for such other relief as the Court may deem fit and proper.

William Waller, Counsel for Complainant-Appellant.

[fols. 14-254] Service of appeal papers under Rule 12 (omitted in printing).

number of gallons in storage." Texas Co. vs. Fort, 168 Tenn., 679, 687.

"Chapter 58, Tennessee Public Acts, 1923, as amended by chapter 67, Tennessee Public Acts, 1925, is said, by its caption, to impose a privilege tax 'on persons . . . and corporations engaged in or carrying on the business . . . of selling or storing or distributing gasoline . . .' . . . Storage of the gasoline and withdrawal of it from storage within the State for use or sale, are, as the State Supreme Court has held, the events which, by the very terms of the statute, call it into operation. Foster & C. Co. vs. Graham, 154 [fol. 261] Tenn., 412; Quick Service Tire Co. vs. Smith, 156 Tenn., 102." N. C. & St. L. RR. Co. vs. Wallace, 288 U S., 249, 265, 77 L. ed. 737.

Esso contends that it is a condition precedent to liability for this tax, that the taxpayer shall have imported the gasoline. While we find no support for this argument in the cases cited above, in the present case, it is unnecessary to decide that question since technically Esso did import the gasoline into Tennessee by removing it from the channels of interstate commerce on the barges on the river into its trucks and tanks on the bank.

Further, Esso insists that the decision in Tennessee Oil Co. vs. McCanless, 178 Tenn., 683, relieves it from liability in the present case. We find that case clearly distinguishable on the facts. In that case, the Obion County Board of Education rented a storage tank from the Tennessee Oil Company, with an agreement that it would pay the Tennessee Oil Company a fee of two cents a gallon for distributing the gas on order of the Board. In legal effect, the Board of Education, which was exempt, was storing gasoline in its own tank. Although the rental of the storage tank was a nominal amount, it had the effect of changing the status of the Tennessee Oil Company from that of an independent contractor to that of an agent or servant of the Board. In the present case, the charge which Esso made the United States for storage alone, was a very substantial and lucrative business considering the vast amount [fol. 262] of gasoline involved, since the contracts show that Esso charged from 18/100 of a cent to 6 3/10 cents

per gallon for receiving and storing the gasoline in its tanks. This was particularly true, as the State insists, since at the time of these contracts the United States owned all gasoline of this quality, and without this Government business, Esso would have had no lucrative return on its tanks, and made no money with which to pay its personnel.

We conclude, therefore, that Esso was properly assessed with privilege taxes defined in Code sec. 1126, et seq.

Esso further insists that some of the gasoline received in the Memphis tanks was later, on order of the United States, exported to Mississippi and Arkansas. As to the exported gasoline, it is insisted that if liable at all for the privilege tax, it is liable only for the tax at the export rate of 1/20 of one cent per gallon. Esso kept no figures of the amount of the exported gasoline, and made no return showing those figures to the Department of Finance and Taxation, as the law requires. Apparently, it is impossible at this point, to establish with any accuracy, what those figures were. Since, under the frame of the Act, the assessment for the tax is made on the returns of the taxpayer, and since the taxpayer is claiming the exemption, the burden was on the taxpayer to show the exact amount of the gasoline exported, in order to avoid the higher rate. Hamilton Natl. Bank vs. McCanless, 176 Tenn., 570; Fidelity-Bankers [fol. 263] Tr. Co. vs. McCanless, 181 Tenn., 476.

As to Esso's insistence that by reason of the fact that the State made no demand for the taxes when they became due, and that State officers acquiesced in the non-payment of taxes, that the State is now estopped and precluded from collecting the taxes, it is only necessary to say that there was never any formal remission of these taxes by any responsible authority, and there is substantial evidence in the record that the matter of taxability was held in abeyance and never decided. In any event, it is general law (31 C. J. S., Estoppel, p. 412, sec. 140-b), which has many times been followed by this Court; Natl. Life & Acc. Ins. Co. vs. Dempster, 168 Tenn., 446; Reynolds Tobacco Co. vs. Carson, 187 Tenn., 157; American Bemberg Corp. vs. Carson, 188 Tenn., 263; that a mistaken construction of the law by a public officer cannot work an estoppel against the State in the collection of its revenue. The record does not show that

Esso was prejudiced in any way by a failure to collect the tax. State vs. McPhail, 156 Tenn., 459, 460.

Finally, we consider the third question, and the assignment by the State, that the Chancellor committed error in remitting interest and penalties on the taxes. Under the facts of this case, where there had been no formal demand by collectors at the time the taxes were due, and when there was a bona fide doubt of tax liability, the remission of inter- [fol. 264] est and penalty was within the sound discretion of the Chancellor on principles of equity; Brewing Co. vs. Currier, 126 Tenn., 535, where at page 551 of the opinion, Judge Green cites with approval, the following statement from Cooley on Taxation:

> ". . . the penalty should not be exacted if the delay came from serious doubt of the validity of the tax." (Cooley on Taxation, Vol. 2, p. 901.)
>
> "This controversy is being waged in a court of equity and this Court, since East Tenn. Brewing Co. vs. Currier, 126 Tenn., 535, has exercised the power of remitting penalties imposed upon taxpayers when the equities of the case seem to demand. See also Shipp v. Cummings, 158 Tenn., 526, and State et al. vs. Rowan, et al., 171 Tenn., 612." Memphis Nat. Gas Co. vs. McCanless, 180 Tenn., 695, 705-706.

From the foregoing authorities, we conclude that the matter of the remission of interest and penalty was within the sound discretion of the Chancellor, and on the facts of this [fol. 265] case, we find no abuse of that discretion.

Finally, we consider the intervening petition of the United States and its assertion of "implied immunity." We observe that any liability of the United States, under our decision, is the result of private contract with Esso, and not the result of State action. In argument, it was stated by counsel for the United States, that the authority upon which insistence for immunity is based, is the decision of the Supreme Court of the United States in U. S. vs. Allegheny County, 322 U. S. 174, 88 L. Ed., 1209. Since we have held that Esso was only liable for the privilege tax under Code sec. 1126 et seq., and since the only tax involved in U. S. vs. Allegheny County, supra, was an ad valorem tax on

personal property of the United States, we do not find that case in point here. That Esso was liable for the privilege tax for doing business in the State, though that business was done entirely with property of the United States is settled, we think, by James vs. Dravo Contracting Co., 82 L. Ed., 125; State of Alabama vs. King & Boozer, 86 L. Ed., 3; Curry vs. U. S., 86 L. Ed. 9. In the course of the last opinion, which was by Mr. Chief Justice Stone, it was said:

> "As pointed out in the opinion in the King & Boozer case, by concession of the Government and on authority, the constitution, without implementation by Con- [fol. 266] gressional legislation, does not prohibit a tax upon Government contractors because its burden is passed on economically by the terms of the contract or otherwise as a part of the construction cost to the Government." Curry vs. U. S., 86 L. Ed. 9, 11.

This rule was strengthened by the later cases of Penn. Dairies vs. Milk Control Comm., 87 L. Ed. 748, and Mayo vs. U. S., 87 L. Ed. 1504.

From these opinions of the Supreme Court of the United States, we conclude that if Tennessee sought to tax the gasoline which was stored, the tax would be invalid. Such would be the effect of our approval of the tax under section 6821 of the Code. In like manner, if the United States was storing its gasoline *in its own tanks*, the tax would be invalid, but in this case we have approved only the tax on Esso for exercising the privilege of doing business in Tennessee by storing and distributing gasoline which was the property of the United States. The validity of that tax follows from the decisions in State of Alabama vs. King & Boozer, supra, and Curry vs. U. S., supra.

All assignments of error are overruled and the decree of the Chancellor is affirmed. The parties will divide the costs of the appeal.

——, J.

[fol. 267] IN SUPREME COURT OF TENNESSEE

DECREE—June 7, 1952

ESSO STANDARD OIL COMPANY

vs.

JAMES CLARENCE EVANS, Commissioner, Etc.

Davidson Equity. Affirmed

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Davidson County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is no error.

It is therefore ordered and decreed by the Court that the decree of the Chancellor be in all things affirmed and that the complainant have and recover of John F. Kizer, Commissioner, etc. or his successor in office the sum of $110,770.83 with interest thereon from November 26, 1951 to this date, being $3,138.50, in all the sum of $113,909.33, and two-thirds of the cost of the Court below, which will be certified for payment in the manner prescribed by law. The remaining third of the cost of the Court below will be paid by the Esso Standard Oil Company, principal, William Waller, surety on cost bond, for which let execution issue.

It is further decreed by the Court that the defendant Commissioner's right to collect and receive the $196,848.68 for gasoline tax from the complainant for the month of January, 1944 as assessed November 30, 1949, is sustained.

One-third of the cost of this appeal will be paid by the Esso Standard Oil Company, principals, and William Waller, surety, for which let execution issue.

The remaining two-thirds of the cost of this appeal will be paid equally by the State of Tennessee and the United States of America, which will be certified for payment in the manner prescribed by law. 6/7/52.

[fol. 268] [File endorsement omitted.]

[fol. 269] IN SUPREME COURT OF TENNESSEE

[Title omitted]

PETITION FOR REHEARING ON BEHALF OF APPELLANT, ESSO STANDARD OIL COMPANY—Filed June 16, 1952

May it Please the Court:

Your petitioner, Esso Standard Oil Company, one of the appellants herein, referred to as "Esso", respectfully states that it is much aggrieved by the opinion and decision of this Court rendered in this case on June 7, 1952, in that Your Honors affirmed the decree of the Chancellor, denying to the petitioner refund of gasoline privilege taxes assessed against it under Sections 1126 et seq. of the Tennessee Code.

Your Honors held in the opinion of the Court written by Mr. Justice Gailor that Esso was properly assessed the seven cents per gallon tax for exercising the privilege of storing aviation gasoline belonging to the United States [fol. 270] Government, including gasoline exported by common carrier to other states, but that penalties and interest and the inspection fee should be remitted to Esso.

1. *Esso did not import the gasoline into Tennessee.*

In holding that Esso was properly assessed with privilege taxes under Code Section 1126 et seq., it was stated in said opinion of this Court:

> "Esso contends that it is a condition precedent to liability for this tax, that the taxpayer shall have imported the gasoline. While we find no support for this argument in *the cases cited above*, in the present case, it is unnecessary to decide that question since technically *Esso did import the gasoline into Tennessee by removing it from the channels of interstate commerce* on the barges on the river into its trucks and tanks on the bank." (Unless otherwise noted, all emphasis in quotations has been added.)

Esso contended that the condition precedent to its tax liability, that the gasoline shall have been imported or transported by it "*into*" Tennessee, is expressly provided

in Code Section 1127 imposing the tax and in the definition of the term "distributor" in Code Section 1126. Esso did not contend that this statutory condition was also to be found in the cases cited by the Court. In all the cases cited, the condition precedent was in fact satisfied because the owner of the gasoline had not only stored the gasoline but had previously imported the gasoline *into* Tennessee from outside the State.

[fol. 271] The primary meaning of the word "import" is "to bring from a foreign country into one's own county; as, we import wines from France." Twentieth Century Dictionary. The word was recently defined by the Supreme Court of the United States in Canton R. Co. v. Rogan, 340 U. S. 511, 95 L. Ed. 488, as follows (340 U. S. at p. 515):

> "To export means to carry or send abroad; to import means to bring into the country. *Those acts begin and end at water's edge.* * * *"

Importation from one state into another is analogous to importation from one country into another. When the barges tied up at the docks on the Mississippi River the gasoline in them was already inside the State of Tennessee. Arkansas v. Tennessee, 246 U. S. 158. In fact, as found by the Chancellor, the gasoline had been inspected by the State (R. 363) and had, therefore, become subject to the jurisdiction of the State of Tennessee before Esso took possession of the gasoline.

A case closely in point is State v. Fidelity & Deposit Co. of Maryland, et al., 78 P. 2d 1090, decided by the Supreme Court of Washington in 1938. In that case the State of Washington attempted to collect the "fuel oil tax" from a railway company for the privilege of distributing oil. The court analyzed the statute in question as follows (78 P. 2d at p. 1092):

> [fol. 272] "It appears, upon analysis of section 79 of the act, that three classes of distributors are taxed, namely: (a) Persons who refine, manufacture, produce, or compound fuel oil and sell, distribute it, or in any manner use the same within the State; (b) persons who import any fuel oil into the State, and store, sell,

withdraw, distribute, or in any manner use the same within the State; (c) persons who, having acquired fuel oil in original packages or containers, distribute or sell the same, whether in the original package or container or otherwise, or in any manner use the same."

It then held that the railway company was not liable for the tax because, although it had received and stored the oil in question, the oil had been imported into the state by another party. The Court said:

"The word 'import,' when used as a verb, means, by derivation, 'to bear or carry into,' and by common usage, 'to bring in.' In its technical meaning, it is usually employed to designate the bringing in of articles from a foreign country. In this statute, it evidently means the bringing into the state of fuel oil from any place without the state. A person who 'imports' fuel oil into the State is one who brings fuel oil into the State."

* * * * * * *

"* * * it is admitted that the oil in question was brought into the State by the oil company and was there sold to the railway company just as the contract contemplated. We therefore hold that the oil company, and not the railway company, imported the oil. Accordingly, the railway company does not fall within any of the classes of persons which the statute makes subject to the tax, for, although it stored and used it, it did not import and store, etc. * * *"

[fol. 273] 2. *The grounds given in the opinion of the Court for distinguishing Tennessee Oil Co. v. McCanless, 178 Tenn. 683 raise new issues of constitutional law.*

The opinion of the Court on this subject was as follows:

"Further, Esso insists that the decision in Tennessee Oil Co. vs. McCanless, 178 Tenn. 683, relieves it from liability in the present case. We find that case clearly distinguishable on the facts. In that case, the Obion County Board of Education rented a storage tank from

the Tennessee Oil Company, with an agreement that it would pay the Tennessee Oil Company a fee of two cents a gallon for distributing the gas on order of the Board. In legal effect, the Board of Education, which was exempt, was storing gasoline in its own tank. Although the rental of the storage tank was a nominal amount, it had the effect of changing the status of the Tennessee Oil Company from that of an independent contractor to that of an agent or servant of the Board. In the present case, the charge which Esso made the United States for storage alone, was a very substantial and lucrative business and considering the vast amount of gasoline involved, since the contracts show that Esso charged from 18/100 of a cent to 6-3/10 cents per gallon for receiving and storing the gasoline in its tanks. This was particularly true, as the State insists, since at the time of these contracts the United States owned all gasoline of this quality, and without this Government business, Esso would have had no lucrative return on its tanks, and made no money with which to pay its personnel."

In the case at bar the Court holds for the first time, in construing Code Sections 1126 et seq., that the ownership of the gasoline is immaterial. In the Tennessee Oil Company case the Court held that the *determinative* question was "To whom does the gasoline belong when it comes to rest in the State of Tennessee" (178 Tenn. p. 691). As now construed, Code Sections 1126 et seq., impose a tax of seven cents per gallon under the facts disclosed by the record in [fol. 274] the case at bar, but no tax under the facts of the Tennessee Oil Company case. As so construed, Code Sections 1126 et seq., deny Esso the equal protection of the laws guaranteed by the Fourteenth Amendment and are unconstitutional and void because there is no reasonable basis for the classification made by the Court.

Your Honors did not undertake in the opinion filed to spell out in detail the distinction or distinctions between the two classes of cases,—the one where the tax is not due, and the other where the tax is due. Your Honors did hold, as we read the opinion, that the distinction or distinctions between

the two classifications are not such that Esso and the United States could have chosen to come within the exempt class, rather than in the non-exempt class, and have made this choice effective by a formal change in the contracts, such as a provision for the payment of a nominal flat rental for the use of the tanks in addition to the charge per gallon. We say this because Your Honors held that Esso was not "prejudiced in any way" by the State's failure to collect the tax as and when it became due. Obviously if Esso and the United States could, by some such formal change, have put themselves in the Tennessee Oil Company classification, the State's failure to collect the tax as and when it became due, misled Esso and *did* prejudice it. The collection of the tax for one month would have enabled the parties to avoid the tax for all succeeding months.

Since Your Honors did not spell out the distinction or distinctions between the two classifications, we can do no more in this petition for rehearing than urge, as we do, that [fol. 275] whatever the distinction or distinctions are, they are so unreasonable and arbitrary and lacking in substance as to render Code Sections 1126 et seq., unconstitutional and void because they deny Esso equal protection of the laws.

We deem it proper to point out in this connection that the statutory language itself gives no suggestion of a distinction or distinctions now made by the Court and that no prior decision of the Court suggests such distinction or distinctions.

We further deem it proper to point out that the charge of two cents per gallon made in the Tennessee Oil Company case covered both storage and distribution (within Obion County) and the range of fees in the case at bar, 18/100 of a cent per gallon to 6-3/10 cent per gallon, is based mainly upon the mileage involved in distribution, where such distribution was to be made in Esso's own equipment. In the case at bar (involving January 1944) the only distribution from the Memphis Terminal in Esso's own vehicles was of gasoline going to Memphis Airport. All the other gasoline was delivered by Esso to common carriers and the total charge made by Esso was a fraction of a cent per gallon. The facts in this regard are clearly set forth in the briefs heretofore filed, with specific references to the record.

It is well settled that an arbitrary classification for pur-

poses of taxation conflicts with the Fourteenth Amendment. Schlesinger v. Wisconsin, 270 U. S. 230. The Fourteenth Amendment requires that the classification be not arbitrary, [fol. 276] but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation. Quaker City Cab Co. v. Pa., 277 U. S. 389. Phrasing the same principle differently:

> "The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment. * * * *" (Hillsborough v. Cromwell, 326 U. S. 620).

It is respectfully submitted that the classification made by Sections 1126 et seq. of the Code of Tennessee, as now construed by the Court, is so arbitrary as to amount to no classification at all, and Esso specifically relies upon the equal protection of the laws clause of the Fourteenth Amendment as a ground for this petition for rehearing.

3. *Export gasoline.*

In the opinion of this Court, it was stated that "Esso kept no figures of the amount of the exported gasoline, and made no return showing those figures to the Department of Finance and Taxation, as the law required. Apparently, it is impossible at this point, to establish with any accuracy, what those figures were."

There has been no dispute as to the amount of export gasoline involved in this case. Esso did keep the figures and [fol. 277] the exact amount for the month of January 1944 was 1,005,832 gallons. This was the exact amount alleged in the complaint (R. 7) and proved without contradiction (R.159, 174), and is the amount specified in Esso's third assignment of error.

It is true that in Esso's monthly report to the Commissioner of Finance and Taxation which included all the government owned gasoline for January 1944, Esso did not give separate figures on the 1,005,832 gallons of export gasoline. The reason for this was obvious. At the time the gasoline in question was inspected, stored for export and exported,

the State was not claiming that any of the government owned gasoline was subject to either the gasoline privilege taxes or to the inspection fee. It was useless for the taxpayer to pay 1/20 cent per gallon inspection fee and claim an exemption as to additional taxes at a time when the State was not claiming any tax liability.

No requirement of law has been pointed out whereby Esso was required to make any return or report on the export gasoline other than it has done. Chapter 50 of the Public Acts of 1943 (Williams Code, Sections 6850.7-6850.11), the statute which provides for the exemption, was attached as an appendix to Esso's Assignments of Error, etc. on this appeal. We find no provision in this statute requiring Esso to make any reports other than the reports it has made. In the letter of December 16, 1943, in which Mr. Weakley requested Esso to make monthly reports of the government owned gasoline, no request was made that the export gasoline be reported separately (Defendant's Exhibit 4). Esso included in its monthly returns all the information the Department of Finance and Taxation called for and no tax [fol. 278] was assessed thereon until shortly before this litigation commenced. Beginning promptly after the assessment and collection of this tax on all the government owned gasoline, Esso has consistently claimed that it is entitled at least to exemption from all but the inspection fee of 1/20 of 1 cent per gallon on the 1,005,832 gallons of export gasoline.

In denying the contention of Esso that because of the inequitable course of conduct of the State, the State should be denied recovery of the taxes at this late date, the Court concluded with the statement that "The record does not show that Esso has been prejudiced in any way by a failure to collect the tax."

Even if the State cannot be estopped, still it should not be permitted to profit from its own wrong. The State officials misled Esso into believing that separate reports and payment of 1/20 cent per gallon on the export gasoline were not required. The Court correctly states that "under the frame of the Act, the assessment for the tax is made on the returns of the taxpayers". Here the State did not make such assessments until several years later. Esso has been prejudiced by such action of the State, at least in so far as the export gasoline is concerned.

Your petitioner respectfully requests a rehearing based upon the propositions discussed above.

A copy of this petition has been furnished counsel for the State.

Respectfully submitted, Waller, Davis & Lansden, by William Waller, Solicitors for Petitioner, Esso Standard Oil Company.

[fols. 279-280] STATE OF TENNESSEE,
County of Davidson:

I, William Waller, make oath that I am one of the solicitors for the petitioner in this case and that in my opinion the petitioner is entitled to the relief sought.

William Waller.

Sworn to and subscribed before me this 16th day of June, 1952. O. Lawrence Dortch, Notary Public. My commission expires: 1/12/55. (Seal.)

Receipt is acknowledged of a copy of the foregoing petition for rehearing. This 16th of June, 1952.

Walker & Hooker, Cummings & Crabtree, Solicitors for State of Tennessee, by K. Harlan Dodson, Jr.

[fol. 281] IN SUPREME COURT OF TENNESSEE

[Title omitted]

REPLY TO THE PETITION FOR REHEARING FILED BY THE APPELLANT, ESSO STANDARD OIL COMPANY—Filed June 26, 1952

May It Please the Court:

Under date of June 16, 1952, the appellant, Esso Standard Oil Company, hereinafter referred to as "Esso", filed a petition to rehear to the opinion and decree of this Court dated June 7, 1952, which said opinion and decree affirmed [fol. 282] the decree of the Chancellor denying the appellant, Esso, the complainant below, a refund of certain privilege taxes assessed against it by the Commissioner of Finance and Taxation.

The petition to rehear is divided into three parts, and we will reply to the same for clarity in the same manner.

1. *Appellant's insistence that "Esso did not import the gasoline into Tennessee".*

As we read appellant's argument, it is identical with the argument made by it in its original brief filed in this cause (pp. 18-20, "Assignments of Error, Brief and Argument of Appellant, Esso Standard Oil Company"). This being true, under Rule 32 of this Court, the petition to rehear should be refused.

Even if this were not true, appellant's argument is fallacious for two reasons. In the first place, this Court and the Supreme Court of the United States, as we pointed out in our original reply brief (pp. 14-18, "Reply to the Assignments of Error, Brief and Argument Filed by Appellant, Esso Standard Oil Company") have previously found that our Statute imposes a privilege tax on the business of storing gasoline which Esso admittedly did.

N. C. & St. L. Ry. v. Wallace, 288 U. S. 249, 53 S. Ct. 345, 77 L. Ed. 730

[fol. 283] *Texas Co. v. Fort*, 168 Tenn. (4 Beeler) 679, 80 S. W. (2d) 658

Quick Service Tire Co. v. Smith, 156 Tenn. (3 Smith) 96, 299 S. W. 807

Foster & Creighton v. Graham, 154 Tenn. (1 Smith) 413, 285 S. W. 570.

Secondly, as the appellee pointed out in its brief and in oral argument, to which argument appellant attempted to reply when the case was heard, and as found by this Court, (p. 7, Opinion of the Supreme Court of Tennessee by Mr. Justice Gailor), Esso did import the gasoline into Tennessee by removing it from the channel of interstate commerce into Esso's storage facilities.

It results, therefore, that under either theory, as pointed out by Mr. Justice Gailor in the Court's Opinion (p. 7), this Court was eminently correct in its response to this assertion made by Esso on the original hearing.

2. *Appellant's insistence that "The grounds given in the opinion of the Court for distinguishing Tennessee Oil Co. v. McCanless, 178 Tenn. 683 raise new issues of constitutional law."*

Appellant, now for the first time, seeks to raise a new constitutional question; one not raised in the Court below or in this Court on the main hearing of the cause. This, of course, cannot be done; this Court having previously held that it will not consider a Federal constitutional ques-
[fol. 284] tion raised for the first time in the litigation on a petition to rehear.

Tenn. Oil Co. v. McCanless, 178 Tenn. (14 Beeler) 683 at 703, 162 S. W. (2d) 1081, app. dis. 63 S. Ct. 34, 317 U. S. 588, 87 L. Ed. 482

Even if this were not the law, petitioner's conclusion would be without merit, being based upon spurious reasoning. This Court properly held in its Opinion by Mr. Justice Gailor that the case of *Tennessee Oil Co. v. McCanless*, 178 Tenn. 683, was completely distinguishable on the facts. In the Tennessee Oil Co. case the Court found that a governmental agency, completely exempted from the tax, was storing in its own tanks. There is no tax on the privilege of owning tanks, but only on the storage of gasoline in such tanks. It is true in that case that Tennessee Oil Company owned the tanks, but it was not exercising the privilege of storing gasoline, the privilege taxed. Here Esso was exercising the privilege of storing the gasoline, the taxable privilege, from which it received substantial revenue, and therefore the tax was properly imposed.

There is, we respectfully submit, no merit in the argument that because, one, who is found by the Court not to be exercising the privilege taxed, is not taxed, whereas
[fol. 285] one, who is found to be exercising the privilege taxed, is subjected to the statutory tax.

3. *Appellant's insistence as respects "Export gasoline".*

Again, appellant is confronted with Rule 32 of this Court requiring a refusal of the petition to rehear for the reason that the argument now made is the same as that made

before, even though it be couched in slightly different language (pp. 36-37, "Assignments of Error, Brief and Argument of Appellant, Esso Standard Oil Company.

Certainly, Esso cannot now claim the benefit of an exemption when it did not furnish any records to the Department at the time from which the Department could make any considered determination of the accuracy of the same. Nor is it any answer for Esso to say that at this late date they can now come forward and furnish such.

Based on the returns filed by Esso with the Department, from which the assessment here complained of was made, the assessment was entirely proper and legal, and in fact was the only assessment which could have been made from the records furnished by Esso.

[fol. 286] Wherefore, we respectfully submit that the petition to rehear is totally without merit, and the same should be forthwith denied.

Respectfully submitted, Cummings & Crabtree, Walker, Hooker, Keeble, Dodson & Harris, by K. Harlan Dodson, Jr., Solicitor for the Respondent, the Appellee.

Proof of service (omitted in printing).

[fol. 287] IN SUPREME COURT OF TENNESSEE

Davidson Equity

ESSO STANDARD OIL COMPANY

v.

JAMES CLARENCE EVANS, Commr., etc.

OPINION ON PETITION TO REHEAR

Petition to rehear has been filed seeking a reconsideration of our former opinion. The petition is divided into three parts.

By the first part, it is insisted that Esso did not "import" the gasoline upon which the tax was laid. In our former

opinion, we held that it was unnecessary to a decision, to decide whether or not Esso had imported the gasoline, and expressly so stated.

> "Esso contends that it is a condition precedent to liability for this tax, that the taxpayer shall have imported the gasoline. While we find no support for this [fol. 288] argument in the cases cited above, in the present case, it is unnecessary to decide that question since technically Esso did import the gasoline into Tennessee by removing it from the channels of interstate commerce on the barges on the river into its trucks and tanks on the bank."

We re-affirm that holding.

By the second part of the petition to rehear, it is re-argued that we should apply the rule made in Tennessee Oil Co. vs. McCanless, 178 Tenn., 483. We fully considered that case in our former opinion (pp. 7 and 8) and found and held that it was clearly distinguishable from the case at Bar. We find nothing in the re-argument to change our former opinion, and the re-argument itself, clearly does not justify a rehearing under Rule 32 of this Court, 185 Tenn., 879.

By the third and final part of the petition to rehear, Esso claims that we should modify our former opinion, and make allowance to it on account of that part of the gasoline handled and taxed which was "export gasoline." Under the law, the tax is assessed on the returns of the taxpayer. It is not insisted that the Commissioner did not make the assessment in the present case, in accord with the return made by Esso. The Petitioner is, therefore, in the position [fol. 289] of seeking to falsify its own return. This Court could only decide between conflicting returns and assessments, that is to say, if the Commissioner proposed one return and assessment, and the taxpayer proposed another, doubtless, this Court could decide between them, but the present record presents no such conflict.

We find nothing in the petition to rehear to escape the application of Rule 32, 185 Tenn., 879, and the petition to rehear is denied.

_____, J.

[fols. 290-290a] IN SUPREME COURT OF TENNESSEE

Davidson Equity

Petition to Rehear Denied

ESSO STANDARD OIL COMPANY et al.

vs.

JAMES CLARENCE EVANS, Commissioner etc.

JUDGMENT ON PETITION TO REHEAR—July 11, 1952

This cause coming on further on a petition to rehear, reply thereto, upon consideration of all of which, for the reasons stated by the Court in its opinion filed, the opinion is denied at the cost of the petitioner. 7/11/52.

[fol. 291] IN THE CHANCERY COURT OF DAVIDSON COUNTY

[Caption omitted]

ORIGINAL BILL—Filed December 29, 1949

To the Honorable Thomas A. Shriver, Chancellor, Holding the Chancery Court, Part One, for Davidson County, Tennessee:

No. 68050

Bill of Complaint of

ESSO STANDARD OIL COMPANY, a Delaware Corporation, Qualified To Do Business in Tennessee and Having an Office and Agency in Davidson County, Tennessee, Complainant,

vs.

JAMES CLARENCE EVANS, Commissioner of Finance and Taxation of the State of Tennessee, Having His Official Residence in Davidson County, Tennessee, Defendant

Complainant respectfully states to he Court as follows:

[fol. 292]

I

The parties are as stated in the caption. The former corporate name of complainant was Standard Oil Company

of New Jersey, which by charter amendment effective January 28, 1948, was changed to Esso Standard Oil Company. Complainant is the successor to the business, franchises, property and rights of Standard Oil Company of Louisiana, a corporation organized under the laws of Louisiana on April 10, 1909. By an agreement of merger dated December 8, 1944, effective as of the close of business on December 31, 1944, Standard Oil Company of Louisiana was merged with and into Standard Oil Company of New Jersey and under said merger the surviving corporation thereof, Standard Oil Company of New Jersey (complainant's former corporate name) succeeded Standard Oil Company of Louisiana and has continued without interruption the business theretofore conducted by Standard Oil Company of Louisiana in the State of Tennessee. In 1944 and for many years prior thereto Standard Oil Company of Louisiana was a distributor of gasoline in the State of Tennessee as defined in Section 1126 of the Code of Tennessee and was properly qualified as such, and since the merger complainant has been a distributor of gasoline in the State of Tennessee as defined in Section 1126 of the Code and has been properly qualified as such. The word "complainant" as used in this complaint means Standard Oil Company of Louisiana whenever references are made to a period of time prior to the aforesaid merger.

[fol. 293]

II

This is a suit brought to recover $295,810.10 alleged to have been due and owing by the complainant for gasoline taxes and inspection fees for the month of January, 1944, together with penalty and interest thereon, and paid under protest by complainant on November 30, 1949, after a distress warrant had been prepared and signed by the defendant, Commissioner of Finance and Taxation of the State of Tennessee, and its issuance and service threatened.

III

(a) During the entire year 1943, or for the greater part of that year, the complainant was engaged in the performance of a contract entered into by it with the United States of America, to wit, Contract No. W 535 ac 36547, and duly executed supplements thereto.

(b) During the entire month of January, 1944, and subsequently thereto through June 30, 1944, the complainant was engaged in the performance of contracts into which it entered with the United States of America, being contracts Nos. W-33-038 ac 1683, W-33-038 ac 1863 and W-33-038 ac 1669, and duly executed supplements thereto.

(c) During the balance of 1944, the entire year 1945 and during part of the year 1946, the complainant was engaged in the performance of contracts entered into by it with the United States of America, being Contracts Nos. W 33038 ac 13022 and W-33-038 ac 12046, and duly executed supplements thereto.

[fol. 294] (d) All the above mentioned contracts are in all relevant respects similar in form, nature and effect.

(e) All of the above mentioned contracts were entered into by the United States in the furtherance of its prosecution of World War II which was then in progress.

IV

Under the provisions of the contracts mentioned in paragraph III hereof, the complainant, for fixed considerations ranging from eighteen one hundredths of a cent to 6.3 cents per gallon, undertook to, and did, receive from the United States, in Tennessee, aviation gasoline which it was to, and did, place in its own facilities and in facilities belonging to others and leased by the complainant for the specific purpose of its performance under the mentioned contracts, all located in Tennessee, and which it was to, and did, deliver to the United States at points within the State of Tennessee or to common carriers or contract carriers employed by the United States for transportation to points without the State of Tennessee, all in accordance with directions given to it by the United States as provided in such contracts.

V

Under the provisions of the contracts mentioned in this bill of complaint all applicable and valid State or local taxes, fees and charges required to be paid by the com-
[fol. 295] plainant because of its performance thereunder are made reimbursable to the complainant as an obligation of the United States under the terms of the respective

contracts. Therefore complainant alleges that the United States is directly and immediately affected by the prosecution of this cause.

VI

During the period of time involved in this suit and during all of the periods when this complainant was engaged in the performance of the contracts hereinabove mentioned, this complainant at the time of its receipt of government owned gasoline in Tennessee, had no interest or equity in, or other ownership of, or independent control over, any government owned gasoline delivered to it by the United States.

VII

Complainant alleges that with respect to all government owned gasoline received by it in Tennessee under the provisions of the contracts mentioned above, employees of the Gasoline Tax and Oil Inspection Division of the Tennessee Department of Finance and Taxation signed inspection reports showing the receipt of such gasoline. These reports were filed with the Department of Finance and Taxation at Nashville.

VIII

Complainant alleges that upon the written request of the Tennessee Department of Finance and Taxation, this com- [fol. 296] plainant, beginning with the month of December, 1943, made monthly reports to said Department of all of its receipts of government owned gasoline and continued to make monthly reports of similar receipts for the entire years 1944 and 1945 and for the year 1946 up to the time the performance of said contracts had been completed.

IX

At no time during any of said years, nor at any time until August 10, 1949, did the defendant in this cause, or his predecessors in office, make any demand upon this complainant for the payment of any tax or inspection fee on account of government owned gasoline received by the complainant as aforesaid, but to the contrary the defendant and his predecessors in office, with full and actual knowledge of complainant's performance of the contracts above men-

tioned, treated the receipt, storage and delivery of government owned gasoline in conformity with the contracts above mentioned as being free from tax and not subject to any exaction under the Tennessee gasoline tax and oil inspection laws.

X

In reliance upon the contemporaneous and continued administrative construction placed on the Tennessee gasoline tax and oil inspection laws by the State of Tennessee and the officers of that State charged with the administration and enforcement thereof to the effect that government owned gasoline received, stored and delivered in Tennes- [fol. 297] see was not subject to the Tennessee gasoline tax or to the payment of any Tennessee inspection charge, the complainant and the United States entered into and performed for the year 1944, and subsequent years, contracts similar to the contract applicable to the year 1943, and neither complainant nor the United States would have entered into such contracts except in reliance upon that recognized construction.

XI

The defendant has advised complainant that in addition to the payment exacted of the complainant for the month of January, 1944, mentioned and described in paragraph II of this bill of complaint, taxes, penalties, interest and inspection fees are due for the remainder of the year 1944, for the year 1945, and for the first six months of the year 1946 aggregating $3,818,212.16 of taxes, $381,821.19 in penalties, $1,157,677.81 in interest to September 1, 1949 and $220,203.40 in inspection fees. Including additional interest to November 30, 1949 of $57,273.18, and including the assessment for the month of January, 1944, ($295,810.10) the total figure is $5,830,997.84. The defendant at first made an additional claim for 1943 but withdrew it because it was barred by the statute of limitations.

XII

(a) The gasoline taxes and inspection fees exacted of the complainant and paid as alleged in paragraph II of this bill of complaint, are based entirely upon and measured

[fol. 298] by aviation gasoline owned by the United States and brought by it into the State of Tennessee and in which the complainant had no interest or ownership. Upon the delivery to it by the United States in the State of Tennessee of such gasoline, the complainant became, under the provisions of the contracts hereinabove mentioned, a bailee of the United States for hire.

(b) Complainant made no deliveries from the aviation gasoline owned by the United States and received by it as aforesaid, other than at the direction of the United States, and at no time did complainant divert to its own use, or to the use of any other, any of the aviation gasoline so received by it. With respect to such gasoline the complainant was at all times subject to the directions and control of the United States.

XIII

Complainant alleges that during the month of January, 1944, the government owned aviation gasoline, upon or by which the tax, penalties, interest and inspection fees mentioned and described in paragraph II of this bill of complaint were based and measured, aggregated 2,840,529 gallons and was received as will appear from attachment hereto marked Exhibit A to this bill of complaint.

XIV

Complainant alleges that during the month of January, 1944, upon or at the direction of duly authorized agents [fol. 299] of the United States, complainant made deliveries to the United States as follows:

At points within the State of Tennessee—1,760,213 gallons

To common carriers for transportation for the United States to points without the State of Tennessee —1,005,832 gallons.

Complainant further alleges that both before and after the month of January, 1944, deliveries of government owned gasoline were similarly made at the direction of duly authorized agents of the United States.

XV

Complainant alleges that included in its receipts of government owned gasoline during the month of January, 1944, and upon which the tax mentioned and described in paragraph II of this bill was based and measured, were receipts of $2,196,915 gallons of aviation gasoline purchased by the United States from competitors of complainant without the State of Tennessee. Complainant had no part in the refining, manufacture, production or compounding, and no part in the shipment, transportation or importation into Tennessee, of such gasoline and at no time did complainant have any interest whatsoever in such gasoline except that of a bailee for hire.

[fol. 300]

XVI

Complainant alleges that included in the receipts by complainant during the month of January 1944 of government owned gasoline as set forth in Paragraph XIII of this bill of complaint, were 2,833,987 gallons of aviation gasoline received by complainant at Memphis, Tennessee as follows:

(a) 995,082 gallons were pumped into three tanks owned by Lion Oil Refining Company, designated Tanks L-1, L-2, and L-3, located adjacent to complainant's own storage facilities, which three tanks were leased by complainant for the sole purpose of containing government owned gasoline and were not otherwise utilized by complainant. In accordance with its contracts, the United States paid complainant for handling this gasoline, in addition to a specified rate per gallon, fixed amounts which were exactly equal to the rental paid by complainant for said tanks plus its expenses in connecting them to its pumping facilities.

(b) 790,744 gallons were pumped into a special tank of complainant, designated Tank 17, which was not otherwise utilized by complainant but which, at the time government owned gasoline was first introduced therein, contained a small amount of complainant's gasoline of like grade and quality upon which Tennessee gasoline tax and inspection fees were duly paid, that could not be removed from the bottom of the tank.

[fol. 301] (c) 1,048,161 gallons were pumped into two tanks of complainant, designated Tanks 7 and 8, that also

contained a quantity of complainant's gasoline of like grade and quality placed therein during 1943 and upon which Tennessee gasoline tax and inspection fees were duly paid.

During the month of January 1944 no company owned gasoline was placed in any of said Tanks, L-1, L-2, L-3, 7, 8 or 17. All custody of government owned gasoline by complainant ceased when deliveries thereof during January were made (1) from the foregoing tanks to government owned carriers or to common carriers for transportation contracted for by the government, or (2) from complainant's tank trucks to government owned storage facilities in Tennessee. Throughout the remainder of the period in which complainant handled government owned gasoline, the same tanks were used to contain such gasoline and the manner of utilizing such tanks continued as hereinabove alleged for the month of January, with the exception that company owned gasoline of like grade and quality upon which Tennessee gasoline tax and inspection fees were duly paid, was placed in Tanks 7 and 8 at times during 1944.

XVII

Complainant alleges that included in the receipts by complainant during the month of January, 1944, of government owned gasoline as set out in paragraph XIII of this bill of complaint were 6,542 gallons of aviation gasoline received by it at Knoxville, Tennessee. This receipt was [fol. 302] from a common carrier tank car shipped on government bill of lading from outside the State of Tennessee. Upon receipt of this government owned gasoline it was placed in a tank of complainant along with gasoline of the same grade and quality owned by the complainant in which the United States had no interest. During the month of January, 1944, deliveries of government owned gasoline were made to the United States from complainant's tank by fueling government owned airplanes at the Knoxville, Tennessee, airport, by use of complainant's tank trucks.

XVIII

Wholly aside from any Federal question, complainant alleges that the gasoline involved in this suit could not

be made the measure of gasoline tax or oil inspection fee liability of complainant under the provisions of the Tennessee gasoline tax and oil inspection laws, properly, construed and applied, for the reason that such gasoline was the property of the United States prior to and at the time of its importation into the State of Tennessee; that none of it was refined, manufactured, produced or compounded within the State of Tennessee; that none of it came to rest in Tennessee as the property of complainant; that the United States was the owner of such gasoline at the time it was shipped, transported and imported into the State of Tennessee; that it was shipped, transported and imported into the State of Tennessee by the United States and none [fol. 303] of it was shipped, transported or imported by complainant into the State of Tennessee, within the meaning of Section 1127 of the Code of Tennessee, as amended; and that the United States as the owner of such gasoline was both the consignor and the consignee of such gasoline and complainant was neither the consignor nor the consignee thereof, within the meaning of Section 6821 of the Code of Tennessee.

XIX

Complainant alleges that under the Tennessee gasoline tax and oil inspection laws the gasoline delivered by it to common carriers for transportation for the United States to points without the State of Tennessee, including that set forth in paragraph XIV of this bill of complaint, to wit 1,005,832 gallons, was not, in any event, includible in the measure of tax liability by the State of Tennessee and that the inclusion of such gasoline in the measure of the tax mentioned and described in paragraph II of this bill is illegal and void, under the provisions of Chapter 50, Public Acts of 1943, as amended by Chapter 147, Public Acts of 1947 (Williams Code, Secs. 6850.7-6850.11). Under said statutory provisions, not more than one-twentieth of one cent per gallon inspection fee was collectible on such gasoline.

XX

The Tennessee gasoline tax law, if construed as requiring the inclusion in the measure of the complainant's tax, to be

computed under that law, gasoline belonging to the United [fol. 304] States exclusively and merely in the possession of the complainant as a bailee is repugnant to the Constitution of the United States and void.

XXI

The assessment to the complainant for the purposes of the Tennessee gasoline tax law of gasoline belonging exclusively to the United States, by including the quantity of such gasoline in the measure of the tax assessed, is illegal and void for the reason that such assessment is upon the exclusive property or instrumentality of the United States which is immune from taxation by the State of Tennessee under the Constitution of the United States.

XXII

The assessment to the complainant and the exaction from it of the taxes mentioned in paragraph II of this bill of complaint imposes a tax upon property which is an instrumentality of the United States and constitutes an unconstitutional imposition upon the United States.

XXIII

The defendant by including gasoline owned exclusively by the United States in the measure of the tax alleged to be due by the complainant for the purpose of the Tennessee gasoline tax law has applied the provisions of the Tennessee gasoline tax law in a manner which renders that law invalid under the Constitution of the United States.

[fol. 305]

XXIV

With respect to the Tennessee oil inspection fees exacted of this complainant as mentioned in paragraph II of this bill of complaint, the complainant alleges that, insofar as any portion of *which* exaction may represent the imposition of a tax by the State of Tennessee, such exaction is invalid, unconstitutional and void for the reasons alleged in paragraphs XX to XXIII, inclusive, of this bill of complaint and above set forth.

XXV

The complainant alleges that with respect to so much of the Tennessee oil inspection fees exacted of it as mentioned in paragraph II of this bill of complaint as may represent an exercise of the police power of the State of Tennessee, or a charge for services by the State of Tennessee, said exaction is violative of Article VI, Clause 2, of the Constitution of the United States, since such exaction constitutes an unconstitutional interference by the State of Tennessee with the exercise of powers granted to the United States under the Constitution of the United States.

XXVI

Complaint alleges that under the facts hereinbefore set forth the imposition of penalties is inequitable and that complainant is entitled in this Court of equity to be relieved against them, all other questions aside.

[fol. 306]

XXVII

Complainant alleges that, for all the reasons hereinbefore set forth, it is entitled to recover of the defendant the sum of $295,810.10, applicable to January, 1944, paid by it under protest on November 30, 1949, as hereinabove alleged in paragraph II of this bill of complaint, together with interest at the legal rate of 6% per annum on said sum until the date of the decree, and that it is further entitled to a declaratory judgment or decree that it does not owe taxes, penalties, interest or inspection fees for the remainder of the year 1944, for the year 1945, or for the year 1946, or for any part of any of said years, as claimed by the defendant.

Premises considered, Complainant prays:

1. That proper process issue requiring the defendant to appear and answer this bill at any early rule day but his oath to his answer is waived.

2. That upon the hearing the complainant have a decree against the defendant for the sum of $295,810.10 together with interest at the legal rate of 6% per annum from and after November 30, 1949, and that the proper certificate

be made, pursuant to the requirements of Code Section 1793, to the end that the Comptroller of the State of Tennessee shall issue his warrant for the amount of said decree, which shall be paid in preference to other claims on the treasury.

[fol. 307] 3. That a declaratory judgment or decree be entered adjudging and decreeing that the complainant does not owe taxes, penalties, interest or inspection fees for the remainder of the year 1944, for the year 1945, or for the year 1946, or for any part of any of said years.

4. For general relief.

Armistead, Waller, Davis & Lansden, Solicitors for Complaint.

I am surety for the costs of this cause not to exceed $250.00.

William Waller.

[fol. 307a]

EXHIBIT A TO COMPLAINT

Received at:	Shipped from:	Shipped via:	Date Received	Tank Number	60-Degree Gallons Received		
					Grade 87	Grade 91	Grade 130
Memphis	Baton Rouge, La.	Barge DPC–113–UBL	Jan. 6	7		90,661	
Memphis	Baton Rouge, La.	Barge DPC–113–UBL	Jan. 6	8		159,728	
Memphis	St. Rose, La.	Barge ROR–103	Jan. 11	L–1	224,988		
Memphis	St. Rose, La.	Barge ROR–103	Jan. 11	L–2	216,563		
Memphis	St. Rose, La.	Barge ROR–103	Jan. 11	L–3	221,277		
Memphis	St. Rose, La.	Barge ROR–103	Jan. 11	Line Fill	3,099		
Memphis	Baton Rouge, La.	Barge DPC–425 X	Jan. 15	17			393,225

[fol. 307b–308]

Memphis	Port Arthur, Texas	Barge LTC–24	Jan. 22	L–1	110,128		
Memphis	Port Arthur, Texas	Barge LTC–24	Jan. 22	L–2	106,892		
Memphis	Port Arthur, Texas	Barge LTC–24	Jan. 22	L–3	109,862		
Memphis	Port Arthur, Texas	Barge LTC–24	Jan. 22	Line Fill	2,273		
Memphis	Port Arthur, Texas	Barge DPC–494 X	Jan. 22	8		398,031	
Memphis	Port Arthur, Texas	Barge DPC–424 X	Jan. 23	8		399,741	
Memphis	East St. Louis, Ill.	Barge DPC–409 X	Jan. 28	17			397,519
Knoxville	Baton Rouge, La.	Tank Car	Jan. 31	16			6,542
				Total:	995,082	1,048,161	797,286

NOTE: Tank numbers prefixed "L" indicate tanks leased from Lion Oil Refining Company. "Line Fill" indicates gasoline in the pipes leading to said tanks.

[fol. 309] SUBPOENA TO ANSWER ISSUED DECEMBER 20, 1949 AND SHERIFF'S RETURN (omitted in printing)

[fol. 310] IN THE CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted]

ANSWER OF THE DEFENDANT, JAMES CLARENCE EVANS, COMMISSIONER—Filed February 9, 1950

The defendant, James Clarence Evans, Commissioner of Finance & Taxation of the State of Tennessee, for answer to so much and such parts of the bill filed against him in this cause as he is advised it is necessary and material for him to answer, and answering says:

I

This defendant admits the allegations contained in Section I of the bill.

II

This defendant admits that this is a suit brought to recover $295,810.10, which said amount this defendant collected from the complainant as a privilege tax for the privilege of storing gasoline in the State of Tennessee and as an inspection fee on gasoline stored by the complainant [fol. 311] in the State of Tennessee for the month of January, 1944, together with penalty and interest thereon. This defendant further admits that the same was paid under protest by the complainant on November 30, 1949, after distress warrant had been prepared and signed by this defendant and its issuance and service threatened.

III

This defendant admits all the allegations of Section III of the bill.

IV

This defendant admits the allegations of Section IV of the bill.

V

This defendant is not advised as to the effect of the provisions contained in the contracts referred to in the bill of complaint with respect to whether or not the United States must reimburse the complainant for the taxes here involved and demands strict proof of the same if it be material.

VI

Insofar as this defendant is advised, during the period of time involved in this suit the complainant had no interest or equity in or ownership of the gasoline delivered to it by the United States, but submits that the question of whether or not the defendant had any independent control over the gasoline delivered to it is a question to be determined by [fol. 312] the Court from a proper construction of the contracts between the complainant and the United States. In this connection defendant would show that at least a portion of the gasoline delivered to the complainant by the United States was commingled by the complainant with gasoline which complainant did own.

VII.

The defendant admits the allegations of Section VII of the bill.

VIII.

This defendant admits the allegations of Section VIII of the bill.

IX

This defendant admits that he at no time prior to August 10, 1949, made any demand upon the complainant for the payment of the privilege tax and inspection fees here involved, and is advised that his predecessors in office made no such formal demand. This defendant, however, denies that the receipt, storage and delivery of the government owned gasoline pursuant to the contracts referred to in the bill of complaint was free from tax and not subject to the privilege tax and inspection fees levied on the privilege of storing such gasoline. On the contrary, this defendant is advised that on at least one occasion complainant's agent

was informed that he must make a complete report showing [fol. 313] all such gasoline stored because the Department did expect at some future date to collect the privilege taxes and inspection fees incurred by the complainant as a result of its storage of the gasoline.

Going further, this defendant denies that even if his predecessors in office had treated the storage of the gasoline stored by the complainant as free from tax, such would be totally immaterial since no Commissioner of Finance and Taxation would have any authority to waive the State's right to collect the tax.

X

This defendant is not advised as to the reason for complainant entering into contracts with the United States for the year 1944, and demands strict proof of the same if it be deemed material. This defendant does deny, however, that there has been any contemporaneous or continued administrative construction placed on the Taxing and Inspection Laws of the State of Tennessee by its officers to the effect that the activities of this complainant were not subject to a privilege tax. This defendant would further show to the Court that even if there had been any such construction, the same would be ineffective to bind the State of Tennessee in the collection of its taxes since there is no ambiguity in the Taxing Statutes.

XI

This defendant admits the allegations of Section XI of the bill.

[fol. 314]

XII

This defendant denies that the taxes and fees here involved are based upon gasoline owned by the United States, but does admit that the amount of the tax and fees for which the complainant is liable is measured by the number of gallons of gasoline which the complainant stored, that is the extent of the privilege exercised by it in the State of Tennessee. As to the other matters contained in Section XII of the Bill, this defendant is not fully advised and, therefore, neither admits nor denies said allegations, but demands strict proof if the same be material.

XIII

This defendant admits that during the month of January, 1944, the complainant stored in the State of Tennessee an aggregate of 2,840,529 gallons of gasoline, as appears from Exhibit A to the bill of complaint and it is for the privilege of storing this gasoline that the assessment was made.

XIV

This defendant admits the allegations of Section XIV of the bill.

XV

This defendant is not advised as to the allegations contained in Section XV of the bill, therefore neither admits nor denies the same, but demands strict proof if the same [fol. 315] be material. In this connection, however, this defendant would show to the Court that it is the insistence of the Department of Finance & Taxation that complainant's interest in or ownership of the gasoline involved is totally immaterial, the taxes and fees in question being based upon the privilege of the business of storing the gasoline rather than the ownership or use of the gasoline.

XVI

This defendant is not fully advised as to the allegations contained in Section XVI of the bill, and while insofar as defendant knows, the allegations therein are true, the defendant demands strict proof of the same if they become material.

XVII

In like manner, this defendant is not fully advised as to the allegations contained in Section XVII of the bill and, while insofar as this defendant knows, the allegations contained therein are true, defendant demands strict proof if the same be material.

XVIII

This defendant expressly denies the argument contained in Section XVIII of the bill; denies that the ownership of the gasoline by the United States prevents the same under the statutes from being taxes; and denies that the United

States was both the consignor and the consignee of the gasoline within Section 6821 of the Code of Tennessee.

[fol. 316]

XIX

This defendant is not advised as to whether or not the complainant delivered 1,005,832 gallons or any other amount to common carriers for transportation to points without the State of Tennessee, as alleged in Section XIX of the bill and, therefore, neither admits nor denies the same but demands strict proof thereof. In any event, this defendant would show to the Court that the complainant did not comply with Chapter 50, Public Acts of 1943, as amended by Chapter 147, Public Acts of 1949 (Williams Code 6850.7, 6850.11) in that the complainant did not make proper reports concerning such gasoline to the Commissioner of Finance & Taxation and did not pay the inspection fees in accordance with law, so that complainant is not entitled to any of the benefits, exclusions or credits provided for in said Acts.

XX

Defendant denies that the laws of Tennessee taxing the privilege of storing gasoline as applied in the instant case are repugnant to the Constitution of the United States and void.

XXI

This defendant denies that the assessment to the complainant is illegal and void for the reason that such assessment is upon the exclusive property or instrumentality of the United States and, on the contrary, would show that [fol. 317] no attempt is made or could be made to tax the property of the United States, this tax being simply a tax upon the privilege exercised by the complainant of storing gasoline.

XXII

Defendant denies that the assessment here complained of imposes a tax upon property which is an instrumentality of the United States or that it constitutes any unconstitutional imposition upon the United States.

XXIII

This defendant denies that the provisions of the Tennessee Gasoline Tax Law are being applied in any manner which renders the law invalid under the Constitution of the United States as alleged in Section XXIII of the bill.

XXIV

This defendant denies the allegations and conclusions set forth in Section XXIV of the bill.

XXV

This defendant denies the allegations and conclusions of Section XXV of the bill and would show that the inspection fees exacted of the complainant are based upon complainant's storage of gasoline within the State of Tennessee.

[fol. 318]

XXVI

This defendant denies that the imposition of penalties is inequitable or that the complainant is entitled to be relieved against them.

XXVII

This defendant denies that the complainant is entitled to recover of him the sum of $295,810.10, together with interest, or any other sum.

XXVIII

All other allegations of the original bill not hereinbefore admitted, explained or denied, are here and now generally denied as fully as if set out and specifically denied.

And, now, having fully answered, this defendant prays to be hence dismissed with his reasonable costs.

K. Harlan Dodson, Jr., Joe Brown Cummings, Seth M. Walker, Solicitors for the Defendant, James Clarence Evans, Commissioner.

[fol. 319] IN THE CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted]

ORDER GRANTING THE UNITED STATES LEAVE TO INTERVENE—April 11, 1950

This cause came on to be heard this day upon the petition of the United States for leave to intervene in the above cause and was argued by counsel. Upon consideration whereof the Court doth order and decree that the United States be and it hereby is granted leave to intervene in this cause. It is further ordered, adjudged and decreed that the petition for intervention filed herein on behalf of the United States be and the same is filed in this cause as the intervening petition of the United States, and that the answer heretofore filed by the defendant will stand as the answer to the intervening petition.

Approved for entry: William Waller, Solicitor for Complainant; Walker & Hooker, by K. Harlan Dodson, Jr., Solicitors for Defendant; Berryman Green, Solicitor for Intervenor, United States.

[fol. 320] IN THE CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted]

PETITION OF THE UNITED STATES FOR LEAVE TO INTERVENE, AND INTERVENING PETITION

The United States of America, by its attorneys, J. Howard McGrath, Attorney General of the United States, Theron L. Caudle, Assistant Attorney General of the United States, and Berryman Green, as Special Assistant to the Attorney General, respectfully alleges that it has a real and substantial interest in the matter in litigation and therefore desires to become a party to the litigation by uniting with the complainant in the furtherance of its claim for refund and its recovery in this action for the use and benefit of the United States, and as grounds therefor alleges:

I

That the intervention for which leave is prayed herein is authorized by the Attorney General of the United States and is at the request of the Department of the Air Force.

[fol. 321] II

That the intervenor adopts and incorporates herein by reference all of the allegations and conclusions contained in the original bill herein.

III

That by reason of the facts so alleged, your petitioner has an interest in this cause which it is entitled to protect by intervention herein. Wherefore, your petitioner, United States of America, respectfully prays that leave be granted to it to intervene in this cause; that an order be entered allowing intervention; and that this petition for leave to intervene be considered and adopted by this Court as the intervening petition of the United States.

Your petitioner further prays that the judgment prayed for by the complaint in its original bill be entered and that the Court grant such other and further relief as it may deem proper.

J. Howard McGrath, Attorney General; Theron L. Caudle, Assistant Attorney General; By Berryman Green, Special Assistant Attorney General.

[fol. 322] In the Chancery Court of Davidson County

Rule No. 68050

In the Matter of: Esso Standard Oil Company,

vs.

James Clarence Evans, Commissioner of Finance and Taxation, State of Tennessee,

and

The United States of America, Intervenor

Transcript of Evidence

Stipulation re Depositions

The depositions of Paul C. Stratton, C. E. Bradley, W. Randolph Pietsch, F. V. Thompson, A. W. Goldschmid, T. G. Sleeker, and J. M. Myrick, taken by consent at the offices of

Armistead, Waller, Davis & Lansden, American Trust Building, Nashville, Tennessee, beginning on April 13, 1950, at 9:30 a.m., and concluding on April 14, at 4:00 p.m., said depositions to be read as evidence on behalf of the Complainant and the Intervenor in the above styled cause.

All formalities as to notice, caption and certificate are waived. All objections are reserved to the hearing, except objections based upon the best evidence rule, or the form of the question.

[fol. 323] It is agreed that the court reporters, being notary publics, may swear the witnesses and subscribe their names to the depositions when transcribed.

APPEARANCES:

For the Complainant: William Waller, Nashville, Tennessee.

For the Defendant: K. Harlan Dodson, Jr., Joe Brown Cummings, James Clarence Evans.

For the Intervenor: Berryman Green, Francis W. Sams.

OFFERS IN EVIDENCE

Mr. Waller: Gentlemen, we have prepared a list of 34 exhibits, of which we have given you a copy. All of these exhibits are now on the table. They are numbered 1 to 34 inclusive. We would like to offer those in evidence, for convenience, all in a batch at this time, and they will be later referred to by the witnesses as they are introduced.

Some of these exhibits you will notice have been referred to in the bill and admitted in the answer, but have not been physically filed. Others are certified copies, and some will be further identified later.

Mr. Cummings: Defendant objects to offering in evidence of the exhibits Nos. 1 through 34 for the following reasons:

A. They have not had an opportunity to examine these exhibits prior to this time.

[fol. 324] B. The exhibits have not been proved by any witness, and it is the position of the defendant that they should be offered at this time for identification only.

(The Exhibits referred to above are listed as follows:)

Exhibits 1-7, inc.—Service contracts (three applicable to first period, 1-1-1944 through 6-30-1944; two applicable to second period, 7-1-1944 through 6-30-1944; and two applicable to third period, 7-1-1945 through 6-30-1946.)

Exhibit 1—W-3308 ac 1683, covers storage in company's tanks, period 1-1-1944 through 6-30-1944.

Exhibit 2—W-33-038 ac 1863, covers storage in Lion Tanks, period 1-1-1944 through 6-30-1944.

Exhibit 3—W-33-038 ac 1669, covers storage at Knoxville (and Kingsport), period 1-1-1944 through 6-30-1944.

Exhibit 4—W-33-038 ac 3649, covers storage at Memphis in company's tanks and Lion tanks, period 7-1-44 through 6-30-45.

Exhibit 5—W-33-038 ac 4485, covers storage at Knoxville, period 7-1-1944 through 6-30-45.

Exhibit 6—W-33038 ac 13022, covers storage in company's tanks and Lion tanks, period 7-1-45 through 6-30-1946.

Exhibit 7—W-33-038 ac 12046, covers storage at Knoxville, period 7-1-45 through 6-30-1946.

Exhibit 8—Certified copies of letter dated December 30, 0942, from Defense Supplies Corporation to P. A. W., with [fol. 325] attachments and D. S. C. 50, dated January 4, 1944.

Exhibit 9—Four-party agreement dated December 19, 1942, No. W 535ac 37080,—Army, Navy, PAW and RFC, with supplements relating to grade 100 Av. gas.

Exhibit 10—Monthly fuel release by Army Air Forces Hq., A. S. C., Patterson Field, grade 100 Av. gas, to Standard Oil Company of Louisiana for Baton Rouge, for December, 1943.

Exhibit 11—Monthly fuel release by Army Air Forces Hq., A. S. C., Patterson Field, grade 100 av. gas, to Standard Oil Company of Louisiana, for Baton Rouge, for January 1944.

Exhibit 12—91 Octane aviation gasoline supply contract, No. W-22-038 ac 1018, between War Department and Standard Oil Company of Louisiana, dated November 24, 1943, covering period October 1, 1943, through June 30, 1944.

Exhibit 13—Monthly fuel release by Army Air Forces Hq., A. S. C., Patterson Field, grade 91 av. gas to Standard

Oil Company of Louisiana for Baton Rouge, for December, 1943.

Exhibit 14—Invoice dated December 30, 1943, from Standard Oil Company of Louisiana to U. S. Army, covering 91 octane gasoline shipped on DPC Barge 113.

Exhibit 15—Government Bill of Lading No. WT-343860, covering shipment 91 octane aviation gas, Barge DPC-113, from Baton Rouge, Louisiana, to Memphis, Tennessee.

[fol. 326] Exhibit 16—Government bill of lading, WQ 16739508, Barge ROR 103, from St. Rose to Memphis (diverted from Greenville, Mississippi.) and letter relating thereto dated January 15, 1944, from Husky Transit Corporation to Standard Oil Company of Louisiana.

Exhibit 17—Government bill of lading, WT-343864, Barge DPC-425X, from Baton Rouge to Memphis.

Exhibit 18—91 and 87 octane aviation gasoline supply contract between Gulf Oil Corporation and War Department, No. W-33-038, ac 1008, period October 1, 1943 to June 30, 1944.

Exhibit 19—Gulf Oil Corporation invoice dated January 7, 1944, to U. S. Army, covering 87 octane shipped by Barge LTC—24, from Port Arthur, Texas, to Memphis.

Exhibit 20—Government bill of lading, WT-342891, covering shipment 87 octane aviation gasoline by Barge LTC-24 from Port Arthur, Texas, to Memphis, Tennessee.

Exhibit 21—Gulf Oil Corp. invoice, dated January 7, 1944, to United States Army, covering 91 octane gasoline shipped by DPC-494X, from Port Arthur, Texas, to Memphis, Tenn.

Exhibit 22—Government bill of lading, WT-342885, covering shipment 91 octane aviation gasoline by Barge DPC 494X, from Port Arthur, Texas, to Memphis, Tennessee.

Exhibit 23—Sales invoice dated January 7, 1944 from Gulf Oil Corporation to United States Army, covering 91 octane, shipped by Barge DPC-424-X from Port Arthur, Texas, to Memphis, Tennessee.

[fol. 327] Exhibit 24—Government bill of lading, WT-3422886, covering shipment of 91 octane aviation gasoline by Barge DPC-424-X, from Port Arthur, Texas, to Memphis, Tennessee.

Exhibit 25—Bill of lading, WT-8332990, covering ship-

ment 100 octane av. gasoline (diverted from Louisville, Ky.) from East St. Louis to Memphis, Tenn. by Barge DPC-409X.

Exhibit 26—Pumping contract between U. S. Army Air Forces and Standard Oil Company of Louisiana, No. W-33-040 ac 61.

Exhibit 27—Invoice from Standard Oil Company of Louisiana, dated March 31, 1944, covering pumping services for the month of January, 1944, at Memphis, Tennessee, furnished under above contract.

Exhibit 28—Monthly fuel release by Army Air Forces HQ., A. S. C., Patterson Field, to Standard Oil Company of Louisiana for Memphis terminal for January 1944, relating to 100 octane gas.

Exhibit 29—Monthly fuel release by Army Air Forces HQ., A. S. C., Patterson Field, to Standard Oil Company of Louisiana, for Memphis terminal for January, 1944, relating to 91 octane gas.

Exhibit 30—Government bill of lading WT-343183, covering shipment 91 octane gasoline from Memphis terminal to Smyrna, Tennessee (typical bill of lading covering shipments from terminal to destinations in Tennessee by com-
[fol. 328] mon carrier.)

Exhibit 31—Government bill of lading No. WT-343187, covering shipment of 91 octane aviation gasoline from Memphis terminal to Grenada, Mississippi, dated January 10, 1944, (typical bill of lading covering movements from Memphis Terminal to destinations in Mississippi by common carrier.)

Exhibit 32—Government bill of lading, WT-343690, covering shipment of 91 octane gasoline from Memphis terminal to Little Rock, Arkansas (typical bill of lading covering shipments by common carriers into Arkansas.)

Exhibit 33—Standard Oil Company of Louisiana shipping notice, dated January 25, 1944, covering 91 octane gasoline transferred from Memphis terminal to United States Army 70th sub-Depot, Memphis, Tennessee (typical shipping notice covering transfer of Government gasoline by Standard Oil Company of Louisiana tank truck from Memphis terminal to United States Army Sub-Depot at Memphis.)

Exhibit 34—Lease commencing January 10, 1944, of three storage tanks from Lion Oil Refining Company to Standard Oil Company of Louisiana.

[fol. 329] DEPOSITION OF PAUL C. STRATTON—Filed October 30, 1950

PAUL C. STRATTON, the first witness, being first duly sworn, deposed as follows:

Mr. Waller: This witness will be examined first, if it is agreeable, by Mr. Green, representing the Intervenor, although perhaps the more orderly procedure would be for the Complainant's Counsel to examine him. However, Mr. Green is more familiar with the testimony of these witnesses, and I prefer that he conduct the direct examination.

Mr. Cummings: There is no objection.

Direct examination.

By Mr. Green:

Q. 1. Mr. Stratton, state your residence and present occupation?

A. 1. Residence is Washington, D. C., on the staff of the Munitions Board Petroleum Committee.

Q. 2. State for the record the purposes and duties of that committee?

A. 2. The Munitions Board Petroleum Committee is charged with the responsibility of all logistic planning for the military forces.

Q. 3. With respect to petroleum?

A. 3. With respect to petroleum.

Q. 4. How long have you been associated or employed by the United States?

A. 4. Since October, 1941.

Q. 5. Beginning at that time, will you state the several positions which you have held?

[fol. 330] A. 5. Beginning from 1941 until May, 1943, I was with the Fuel Division, Air Material Command, Wright Field, Dayton, Ohio. I left there in 1943, and went to the Petroleum Administration for War. I was associated with the Petroleum Administration for War, in the Refining Division, until November, 1945, at which time I went to the Army-Navy Petroleum Board, which is now the Munitions Board Petroleum Committee.

Q. 6. In what capacity were you employed in those several agencies?

A. 6. At Wright Field, I was the Assistant Unit Chief of the Overseas Fuel Unit. At the Petroleum Administration for War, I was Petroleum Technologist in the Aviation Refining Division. We had responsibility of allocation and control of all aviation gasoline and components thereof.

Q. 7. Do you know when this Petroleum Administration for War came into being?

A. 7. The Office of Petroleum Coordinator was established by a letter from the President in late 1941. It had no definite authority at that time. Later there was an executive order issued after the declaration of war. It was an executive order issued giving definite responsibility to the Petroleum Administration for War and control of the production of aviation gasoline.

Q. 8. Do you know the number of the executive order that you have mentioned?

A. 8. Offhand I don't. It can be found in the History [fol. 331] of Petroleum Administration for War which you have in front of you there.

Q. 9. Will you look at that and see if you can find it?

A. 9. The letter of the President, which established the Office of Petroleum Coordinator is dated May 28, 1941, signed by "Franklin D. Roosevelt." Executive Order No. 9276, issued 2 December, 1942, established the Petroleum Administration for War, and defines its functions and duties. I might add, Executive Order No. 9319, amended the original Order No. 9276. Then Executive Order No. 9718, dated 3 May, 1946, terminated functions of the Petroleum Administration for War.

Q. 10. Suppose you continue your answer and come up to when the Petroleum Directive 77 was issued?

A. 10. The Executive Order which I previously referred to here established definite responsibilities of the Petroleum Administration for War. On the 24th of July, 1944, Petroleum Directive No. 77 was issued, which further defined the responsibility of the Petroleum Administration for War. They had been functioning under the authority given them in the original executive order. This merely spells out their detailed responsibility.

A. 11. I will ask you the question at this point, does Directive 77 do any more than exemplify the practice and the

exercise of authority previously exercised by the Petroleum Administration of War, under the Executive Order?

A. 11. The Executive Order gave the authority. This [fol. 332] merely spelled out in detail the functions which they had previously been doing under the Executive Order.

Mr. Dodson: You may put in such portions as you want. We don't object.

By Mr. Green:

Q. Turn to your page and let the reporter copy it.

(Petroleum Directive 77 was incorporated into the record by agreement as follows:)

"Petroleum Directive 77. Part 1535.—Petroleum Processing and Refining.

"High-Octane Aviation Gasoline.

"The fulfillment of the requirements for the defense of the United States has created in certain areas a shortage in the supply of aviation gasoline for defense, for private account, and for export; and the following directive is deemed necessary for the prosecution of the war and to provide adequate supplies of aviation gasoline for military and other essential uses.

1535.4 Petroleum Directive 77. (a) Scope and Purpose. This directive governs the manufacture, blending, transfer, and delivery of high-octane aviation gasoline and its components. It also describes the functions of the two governmental agencies which exercise coordinate jurisdiction in this field, and specifies how to make application to them for authority to act.

"The Petroleum Administration for War is an executive agency deriving its authority from Executive Orders 9276 and 9319. The Aviation Petroleum Products Allocation [fol. 333] Committee is a subcommittee of the Munitions Assignment Committee (air) and derives its authority from directives of the Combined Chiefs of Staff dated June 12, 1942, and September 25, 1943.

"The Petroleum Administration for War controls all transfers within the petroleum industry of aviation grade base stock, blending agents, and high-octane aviation fuel. The Petroleum Administration for War instructs industry

with respect to specifications for the types and grades of high-octane aviation fuel which shall be manufactured or blended in regular commercial production. For the manufacture or blending of any other grade or type of fuel, such as experimental fuels, specific authorization must be obtained from the Petroleum Administration for War.

"The Petroleum Administration for War and the Aviation Petroleum Products Allocation Committee exercise joint control over all deliveries, from the petroleum industry to consumers (or their agents), of blending agents, aviation-grade base stock, and high-octane aviation fuel. After the Aviation Petroleum Products Allocation Committee has made an assignment to the War Department, the Navy Department, or for export to any person, the delivery cannot be made until, in addition to the assignment to the War Department, the Navy Department, or for export to any person, the delivery cannot be made until, in addition to the assignment by the Aviation Petroleum Products Allocation [fol. 334] Committee, a release for each specific quantity to be assigned has been issued by the Petroleum Administration for War. An assignment by the Aviation Petroleum Products Allocation Committee is deemed to carry such release by the Petroleum Administration for War automatically in all cases other than deliveries to the War Department, the Navy Department, or for export.

"Consumption of finished high-octane aviation fuel within the petroleum industry (for instance, in research) requires release in advance by the Petroleum Administration for War, which is deemed to carry with it automatically the approval of the Aviation Petroleum Products Allocation Committee."

* * * * * * *

"(4) 'High octane aviation fuel' means finished aviation gasoline which has an octane rating of 87 or more (ASTM D 357-42 T), or which would have an octane rating of 87 or more by said method after the addition of sufficient tetraethyl lead to bring the total thereof up to the total tetraethyl lead content then authorized by current Army-Navy specifications for aviation gasoline of 87 octane number.

"(c) Limitations upon transfers. No person shall deliver or transfer blending agents, aviation-grade base stock, or high-octane aviation fuel to any other person except as authorized or directed by the agency having jurisdiction, as set forth in Paragraph (a).

[fol. 335] "(d) Limitations upon use. No person, unless otherwise authorized by the agency having jurisdiction as set forth in Paragraph (a), shall use or consume blending agents and blending of the regular types and grades of high-octane aviation fuel as directed by the Petroleum Administration for War. No person shall use or consume high-octane aviation fuel unless, and until, assignment of such fuel has been made by the agency having jurisdiction as set forth in Paragraph (a)."

Q. 13. Mr. Stratton, are you familiar with what is popularly called the 4-Party Agreement?

A. 13. Yes, sir.

Q. 14. Of December 19, 1942?

A. 14. Yes, sir.

Q. 15. That 4-Party Agreement is more technically referred to as a contract, is it not?

A. 15. That is right, sir.

Q. 16. Being Contract No. W-535AC27000?

A. 16. That is right.

Q. 17. To what does that contract relate?

A. 17. To the purchase of 100/130 aviation gasoline and in a portion of it one other grade, namely 91 octane, under certain conditions, 91 octane as covered.

Q. 18. Between whom was that agreement entered into?

A. 18. The Petroleum Administration for War, Defense Supplies Corporation, the Department of Air Force, and Department of Navy.

Q. 19. That is carried on the list of exhibits as RFC?

[fol. 336] A. 19. The Defense Supplies Corporation was an agency of the RFD.

Q. 20. I hand you duly authenticated copy of that contract, and ask you to look at that contract, Exhibit No. 9, and *and* ask you to state whether or not that is a true copy of the contract popularly called AC-37000?

A. 20. Yes sir it is a true copy, certified by the Secretary of the Air Force.

Q. 21. Are you familiar with that contract?

A. 21. Yes sir. I was on the original discussions which lead——

Q. 22. Wait a minute now. Did you have any association with the evolution or ultimate development of that contract?

A. 22. When I was employed at Wright Field, I sat in on the original discussions which led to the writing of this contract.

Q. 23. Will you state the circumstances which led up to a negotiation of the contract known as AC-37000?

A. 23. The President of the United States and Prime Minister Churchill had some discussions in early 1942, as I remember it. It was determined by them that the supply of aviation gasoline was critical. The President of the United States, through a letter to the Combined Chiefs of Staff, directed that they establish a procedure for the purchase and allocation of all aviation gasoline. The letter, as I remember, was dated 9 February, 1942, that the President wrote to the Combined Chiefs of Staff. I understand [fol. 337] that that is in Hyde Park in his files. I don't have a copy of it. I was unable to get that. As the result, the Air Forces Navy Petroleum Administration for War, and Defense Supplies Corporation worked out this contract whereby the Defense Supplies Corporation would purchase all 100 octane aviation gasoline and in some cases 91 octane was covered under this contract, but that was only where there was extraordinary expenses involved in the producing of this fuel. The main reason for writing this contract was that reimbursement had to be made to various producers for high cost of producing in order to squeeze out the last barrel, there was a lot of gasoline which was very expensive, and we felt this was a means whereby industry would contract. The military departments could only contract for a period of one year. The Defense Supplies Corporation contracted with the companies for purchase of everything they produced on a 3-year basis. That was one of the main reasons that the contract was entered into. The same letter of the President also directed that they establish a procedure for the allocation of all aviation gasoline and as the result of this——

Q. 24. Just a minute. I want to ask you, what do you mean by "allocation of the gasoline" and to whom?

A. 24. All aviation gasoline was allocated to the individual user. The entire military services and essential civilian users.

[fol. 338] Q. 25. Russia and England?

A. 25. They were included under the lendlease program. The Department of Navy would repurchase the fuel from Defense Supplies Corporation, and re-release it under the lendlease program to our allies.

Q. 26. Why was that necessary, if you know?

A. 26. You mean the re-lease of the fuel?

Q. 27. No, why this procedure, this contract, AC37000?

A. 27. Because of critical shortage of aviation fuels, it was necessary to have absolute control by some Government body of all aviation gasoline produced. We were short of aviation gasoline up to the end of the war.

Q. 28. Subsequent to the 4-Party Agreement, known as AC37000, will you describe the method of purchase, the allocation, and the re-lease of all aviation fuels, and components of aviation fuels, until the controls imposed by Directive 77 were released, and in that connection, will you state, if you know, how that was done and how it was accomplished?

A. 28. After this contract was written, the RFC—prior to the completion of this contract, the RFC sent out a letter to all producers and prospective producers of 100 octane aviation gasoline, they sent out a letter describing this contract and advised that they would send them more detailed information at a later date. One of our exhibits there——

Q. 29. Exhibit 8, it will be.

[fol. 339] A. 29. That brings out the RFC's directives to these companies to the procedure that would be followed. It was—gasoline was produced at these refineries and at the time it was run off into storage tanks by the companies and the quantities determined, the Air Forces Inspector, acting as an agent for Defense Supplies Corporation, would determine the quantity and sign, as agent of Defense Supplies Corporation that he received the quantities that went into the tanks. That was done on this DSC-50. He was

authorized to do so by Defense Supplies Corporation. On the same form, the Air Forces would take title, the same inspector, Inspector for the Department of Air Forces, the Inspector would sign on this same form for the Department of Air Forces, taking title from Defense Supplies Corporation, and the Air Forces was in control of the gasoline until it was finally used up. The Air Forces handled all the transportation themselves after it left the refinery. On the allocation side of the——

Q. 30. Wait a minute, before you get to allocation. As I understand it then, Defense Supplies Corporation, acting under Contract AC-37000, purchased from the refineries at the points of refining?

A. 30. That is correct.

Q. 31. All 100 octane gasoline?

A. 31. That is right.

Q. 32. And at the time of the refining at the refinery, all 100-octane gasoline became, under this contract, and the several executive orders mentioned, the property of the Defense Supplies Corporation?

[fol. 340] A. 32. That is correct.

Q. 33. You have made mention of this inspection by an agent of Defense Supplies Corporation, who was also an agent or Air Force Inspector at the Refinery, is that true?

A. 33. That is true.

Q. 34. Is that what is popularly referred to as D-50?

A. 34. DSC Form 50.

Q. 35. You have made mention of a letter from Defense Supplies Corporation with respect to present and future manufacturing of 100-octane aviation gasoline?

A. 35. Yes sir.

Q. 36. I hand you a document duly authenticated by the Secretary of the RFC, marked Complainant's Exhibit 8, in which there are photostats of certain documents. I will ask you to look at those documents and state whether or not you are familiar with those documents?

A. 36. Yes sir I am familiar with these.

Q. 37. I will ask you to describe those photostats?

A. 37. Here is a letter dated 30 December, 1942, to Mr. Robert B. Gragin, Assistant Director of Refining, Petroleum Administration for War, signed by George Hill, Jr., Vice President of Defense Supplies Corporation, forward-

ing to him copies of correspondence which had been sent to the present and future manufacturers of 100 octane gasoline, which describes the procedure that would be followed. Also attached are sample copies of DSC Form 50, and one copy of a shipment which was raised in question in this case.

[fol. 341] Q. 38. Then the photostatic copy of the DSC Form dated January 4, 1944, is a receipt signed by the single man acting as agent for Defense Supplies Corporation.

A. 38. It is signed by L. T. Carson, as agent for the Defense Supplies Corporation. Then he has further signed it at the bottom of the page as "Army Air Forces Inspector."

Q. 39. I believe you said that that effected one of the shipments involved in this case?

A. 39. That is right, sir.

Q. 40. Do you have in mind the shipment made in January and received at the Memphis Plant in January, 1944?

A. 40. That is right, sir.

Q. 41. Now, without interruption, if you will just proceed with allocation, with whom you are familiar.

A. 41. As the result of the President's letter, the Aviation Petroleum Products Allocations Committee was established as an agency of the Munitions Assignment Committee (Air) which in turn was an agency of the combined Chiefs of Staff. The working personnel, PAW, handled the functions of the Aviation Petroleum Products Allocations Committee, and were furnished by the Petroleum Administration for War.

Q. 42. Wait a minute. These gentlemen don't know what the APPAC is. Give the name and then we will call it the APPAC.

A. 42. Well, the personnel that handled the work of the Aviation Petroleum Products Allocations Committee were also wearing a Petroleum Administration for War hat, [fol. 342] so we saw both sides of the picture at the same time. The total fuel was made available, the estimate of the quantities that would be produced.

Q. 43. Let me qualify you there. It is understood that your testimony at this phase of the case relates only to 100 octane gasoline and certain 91-octane gasoline, where there

were unusual, extraordinary costs incurred in the production?

A. 43. That is true in connection with this contract.

Mr. Cummings: What contract, Mr. Green?

Mr. Green: Contract 37000. Exhibit 9. That is the only contract he is discussing.

By Mr. Green:

Q. 44. Go ahead.

A. 44. The total available, estimated available aviation gasoline, both grade 100/130, 91, and 87 octane was made available to the Aviation Petroleum Products Allocations Committee by the Petroleum Administration for War. They would carry the requirements of the British, all of our allies, as well as the United States Military and essential civilian users such as commercial airlines, engine builders, and they would allocate the total quantity available in accordance with the requirements of the military forces, and essential civilians. The Petroleum Administration for War in turn, after this allocation was made, the Petroleum Administration for War would notify the refineries, all refineries that were producing this grade fuels, to release the gasoline in the quantities which were allocated by refinery source.

[fol. 343] Q. 45. Release to whom?

A. 45. Release to the user.

Q. 46. Who do you mean by "user"?

A. 46. The Departments of Air Force, Navy, airlines, engine builders, and would at the same time notify the Navy, how much each of our allies were to get under the lend-lease program, and the Department of Navy took care of the handling of all lendlease gasoline. The allocations were made to Department of Air Force and Department of Navy, and in the case of airlines and engine builders, they were notified usually for a three-month period of the total quantities of aviation gasoline that they could purchase for their use.

Q. 47. Were they the only ones to whom allocations were made?

A. 47. No sir—all of the military allies obtained allocations but that of course was handled by the United States Navy under the lendlease program.

Q. 48. And under the contract?

A, 48. Under the AC-37000 in the case of 100 octane.

Q. 49. Who received the allocations when made?

A. 49. The Department of Air Force and Department of Navy. I would immediately get them on the phone, tell them—after allocations were made, I would get them on the phone, tell them their total quantity of aviation fuel that they were allocated for use in individual theaters of operation, also the total quantity that they were allowed to use here in the United States. At the same time I would [fol. 344] assign refinery sources to the Air Forces, would merely state that they could withdraw "X" barrels from this refinery in accordance with a worked-out distribution plan, which was worked out by Wright Field, Department of Navy, and The Petroleum Administration for War, and The Office of Defense Transportation.

Q. 50. That is the allocation made, not only in gallons, but the refinery source was designated?

A. 50. The refinery source was designated, not by the Aviation Petroleum Products Allocations Committee, but by Petroleum Administration for War.

Q. 51. Petroleum Administration for War?

A. 51. Yes sir.

Q. 52. Did the refinery get notice of the allocation?

A. 52. The refineries were notified. We always contacted the main offices of the various companies, and they in turn would notify the refineries how much fuel had been authorized for release from their plants. Further notification was made by the Air Force, which I think some of the Air Force people are more familiar with than I am.

Q. 53. From January 1, 1943, until the termination of the war, V-J Day, was it possible for anyone to purchase gasoline which I have mentioned, covered in the letter accompanying Complainant's Exhibit [redacted], was it possible for any person to purchase this type of gasoline without an allocation?

A. 53. No sir they could not.

[fol. 345] Q. 54. I will ask you this question, from the date mentioned and up to the date later mentioned by way of description, could Standard Oil Company of Louisiana, as producer of 100-octane gasoline, retain title to that gasoline from the time of production?

A. 54. No sir, they could not.

Q. 55. In other words, your testimony is that from the time of production at the refinery, all 100-octane gasoline, and the others which you have mentioned under Contract 37000, and the letter set forth in Complainant's Exhibit 9, at the instant of production, that gasoline became whose?

A. 55. It became the property of the United States Government.

Q. 56. Acting through whom?

A. 56. Through its Defense Supplies Corporation.

Mr. Dodson: Let the record show that the Defendant in the one case objects, that is, the case of Esso Standard Oil Company vs. James Clarence Evans, Rule No. 68050, United States of America, Intervenor, Part I, Chancery Court of Davidson County, objects to the three preceding questions and answers, on the ground that the contracts and letters themselves are the best evidence. There will be additional objections at the time of the hearing, but those objections are not being reserved and we are interposing them at this time. Let the record show further that we are objecting on the ground that the questions are leading, all three questions.

[fol. 346] By Mr. Green:

Q. 57. During the period mentioned, in your testimony, who constituted the PAW?

A. 57. The secretary of Interior was designated by the President as the Petroleum Administrator for War.

Q. 58. Harold Ickes. It was further staffed by civil service employees, a great portion of them being on loan to the Government from various oil companies in the United States.

Q. 59. In your testimony you mentioned the Joint Chiefs of Staff?

A. 59. Combined Chiefs of Staff.

Q. 60. Will you state for the record who the Combined Chiefs of Staff were? I don't mean by name; who constituted the Combined Chiefs of Staff?

A. 60. The Combined Chiefs of Staff were the Chief of Staff, United States Army, United States Navy, Chief of Naval Operations, and the British also had representation. I don't know who headed the British delegation.

Q. 61. Was that military, or both?

A. 61. It was military.

Q. 62. Who constituted the organization referred to as APPAC?

A. 62. Department of Air Force Representation, Department of Navy, Department of Army, The Office of British Petroleum Representative in the United States, and it was Chairmaned by a member of the Department of Air Force.

Q. 63. The Secretary?

A. 63. The Secretary was a civilian from the Petroleum Administration for War.

[fol. 347] Q. 64. Under whose authority did APPAC function?

A. 64. Under the Combined Chiefs of Staff.

Q. 65. Combined Chiefs of Staff?

A. 65. Yes sir. In the early days of the war, the Russians did not have representation on APPAC. However, in the latter stages, they did have representation. A United States Naval Officer was designated to represent the Russians on the Allocation Committee.

Q. 66. Were the Army Air Forces notified from time to time of allocations made to the Air Force by APPAC?

A. 66. Copies of the minutes of the APPAC meetings were furnished to the Military Services, and they were notified officially by copies of the minutes of the meeting. Of course the refinery source, that was not developed that way. We merely advised them by telephone and as there were changes that came so fast in availability as to sources because of various changes in their plans, that it was necessary to keep in constant contact with the Air Forces and Navy by phone, giving them any changes in the various refinery production.

Q. 67. Of your own knowledge, do you know whether during the periods involved in this suit, it would have been possible to stockpile or build up reserves of aviation fuel?

A. 67. We were always short of aviation gasoline throughout the entire war. As new refining facilities came into operation, we were able to increase our operating stocks in the overseas theaters, and also our operating stocks in the [fol. 348] United States. However, it was still something that had to be watched daily because we were in no position at any time, where we had surplus stocks or anything that

we could call reserve storage. It was not until the spring of 1945 that the Joint Chiefs of Staff directed that it appeared that the European war was to be terminated, and it appeared that if we could build up a reserve in the United States of any size, we could possibly shut down, based on a one-front war, that is, with Japan, that we could shut down possibly some of the very very high-cost operating plants, and as of V-J Day, we had been able to put into storage some 13,000,000 barrels of 100-octane aviation gasoline, but the majority of that gasoline was placed in storage between V-E Day and V-J Day, after the requirements in Europe had gone down.

Q. 68. From your association with the organizations which you have mentioned in your testimony, and your duties, are you able to state that you were familiar with, or will you say you were familiar with the operation of the Memphis Terminal of Standard Oil Company of Louisiana?

A. 68. I was familiar with it, yes sir. The detailed operating procedure, however, I am not familiar with all the details. Generally, I knew how the terminal was operated.

Q. 69. From your knowledge of the operations at the Memphis Plant of the Standard Oil Company of Louisiana, are you able to state whether or not there was a storage area?

[fol. 349] A. 69. It was merely a terminal for use to ship aviation fuels to using airfields in this area, in the Memphis area.

Q. 70. How did the in-put and out-go at the terminal compare, if you know?

A. 71. What was the question?

Q. 71. How did the in-put and out-go at that terminal compare, if you know?

A. 71. I don't believe I could answer that question.

Q. 72. Mr. Stratton, I will ask you to look again at Exhibit 9, which we have been calling AC-37000, and tell us what the date of that 4-Party Agreement was?

A. 72. The original document is dated 19 December, 1942.

Q. 73. Now, in the later contract, AC-37000 can you state how the method of payment was made or provided for?

A. 73. The Defense Supplies Corporation would tabulate all of the DSC Form 50's that were purchased by the Department of Air Force, and the Department of Navy, and

would bill the Departments monthly for the total quantities of fuel that they purchased.

Q. 74. To whom did the Air Forces and the Navy Department make payment of the amounts billed to them under the DSC Form 50's?

A. 74. To the best of my knowledge, direct to the Defense Supplies Corporation. Inasmuch as that is a Government Corporation, I wouldn't imagine that they would go back into the Treasury. I am reasonably sure that they were billed direct. Some of your Air Force people can [fol. 350] probably answer that better than I.

Q. 75. In what manner was the payment to the refineries of the gasoline made, mentioned and covered in AC 37000?

A. 75. The Defense Supplies Corporation paid the refinery direct.

Further direct examination.

By Mr. Waller:

Q. 1. Mr. Stratton, you mentioned in your testimony the Petroleum Administration for War, and the PAW, were they one and the same?

A. 1. They were one and the same.

Q. 2. You mentioned Aviation Petroleum Products Allocations Committee and the APPAC, were they one and the same?

A. 2. They were one and the same.

Q. 3. You mentioned Wright Field. Was that the Headquarters of the domestic Army Air Forces, or what was Wright Field?

A. 3. Wright Field, well it had quite a few names. It was Air Materials Command and Air Technical Service Command and Air Service Command at different stages during the war, but it was one and the same.

Q. 4. So, when you mentioned that you notified Wright Field, whom did you notify?

A. 4. Headquarters of the Air Forces which handled the distribution and purchase of aviation gasoline.

Q. 5. For the Air Forces within the United States?

A. 5. Yes sir.

[fol. 351] Q. 6. You made some mention between grade

100 aviation gasoline and lower grades, what was that distinction in the method of control?

A. 6. There was no distinction with regard to the method of control. The Petroleum Administration for War under the authority contained in Directive 77, had absolute control of all aviation gasoline and components thereof. The method of allocation was absolutely the same for all grades. The only difference was that the Air Forces bought 87 octane themselves, directly from the producer. In a case of 91 octane, the Air Forces purchased directly from the refinery, or from the producer. With the exception of the small increment that was purchased by the Defense Supplies Corporation, because it was very high-cost gasoline. The refinery would submit to RFC a claim and he was reimbursed for the extraordinary cost by the Defense Supplies Corporation for the extraordinary cost involved in producing that gasoline.

Q. 7. So far as control was concerned, there was no distinction between the different grades of aviation gasoline?

A. 7. That is correct.

Further direct examination.

By Mr. Green:

Q. 1. In my examination, Mr. Stratton, I mentioned up to the time when controls were terminated. Do you know the date when controls over aviation fuels were terminated?

[fol. 352] A. 1. The day following V-J Day.

Q. 2. It was August 14, 1946, I think, I am not sure, is that your recollection?

A. 2. The termination of controls is in a copy of the Federal Register that we have here; Directive 77 was revoked on the 13th of September, 1945.

Q. 3. Mr. Stratton, will you state when and how, if you know the Petroleum Administration for War was terminated?

A. 3. Terminated by a letter from the President.

Q. 4. Wait a minute. Look at the top of it. It is not a letter.

A. 4. Excuse me.

Q. 5. Exhibit 4, Page 378.

A. 5. Terminated by an executive order, No. 9718, dated 3 May 1946, signed by Harry S. Truman.

Q. 6. Mr. Stratton, you testified that controls over aviation gasoline were terminated by way of revocation of Petroleum Directive No. 77 issued as of September 13, 1945, and effective August 15, 1945, is that correct?

A. 6. Yes sir.

Q. 7. If you know, will you please state what happened to the type of aviation fuels covered by the Directive 77 at the time of revocation of Directive 77?

A. 7. Do you mean the finished product, sir?

Q. 8. Yes.

8. A. I don't just recall how long it was after the revocation, the Services purchased all gasoline from Defense Supplies Corporation and made arrangements with the [fol. 353] refineries in the United States for the refineries to store the gasoline under storage contracts made by the Department of Air Force.

Q. 9. In short, the Government bought all of that gasoline?

A. 9. That is right. We had approximately 22,000,000 barrels of 100-octane gasoline in the United States as of V-J Day, and the refineries in lot of cases were unable to produce peacetime products because of the enormous quantity that we had stored in our refineries, so the Air Forces and the Navy had to buy all of that gasoline and tried to work it off into other storage in the United States, in order that the refineries could commence operating to produce peacetime products.

Q. 10. What then became the position of the Federal Government in relation to the gasoline market from the time on?

A. 10. Well, we didn't buy any aviation gasoline for approximately two years. We continued to use these products that we had stored all over the United States, and we were about two years working them off.

Q. 11. Are you able to say from the effective date of the revocation of Petroleum Regulation 77, throughout the whole period, from that time to the end of the last period involved in this litigation, that the Government owned gasoline?

A. 11. That is correct, the Government did.

[fol. 354] Mr. Cummings: For the record, I understand that counsel had stipulated that this deposition only goes to the month of January, 1944?

Mr. Green: That is correct. Anyhow, the point I am making is that from the time of the effective date of that order, the Government owned all gasoline for a period of two years. I have already proved the point.

Further direct examination.

By Mr. Waller:

Q. 1. Mr. Stratton, do you want to clarify one answer you gave on one matter that was discussed?

A. 1. This contract, AC 37000, that is the Air Force contract number. The Department of Navy also used this identical document as their contract, under another contract number. The RFC, Defense Supplies Corporation, they merely referred to it as the 4-Party-Purchase Agreement and the Petroleum Administration for War also referred to it as the 4-Party-Purchase Agreement.

Further direct examination.

By Mr. Green:

Q. 1. Under those different names, they all mean the same document?

A. 1. The same document, but referred to differently by the four parties concerned.

[fol. 355] Further direct examination.

By Mr. Waller:

Q. 1. Mr. Stratton, reference has been made to Grade 100 aviation gasoline, or 100 Octane.

A. 1. We had several different fuels that fell into the range of 100/130. The specification itself calls for 100/130. However, because of various conditions in the refineries, there were waivers granted at different times. Possibly on the lean mixture side, the refiner couldn't reach the exact specifications, so he was given waivers. We had 98/130, 99/130 and 100/130; and in order to avoid all of that detail, we only referred to all gasoline in that range as 100 octane.

Cross-examination.

By Mr. Dodson:

X Q. 1. Mr. Stratton, in the beginning of your direct examination, you referred to Executive Order No. 9276, which created the PAW, and as amended by Executive Order 9319, which gave the PAW certain powers, as I understand it?

A. 1. Yes sir.

X Q. 2. You also referred to the Petroleum Directive No. 77, as appears in the Federal Register of July 24, 1944?

A. 2. Yes sir.

X Q. 3. When you were referring to termination dates, as I understand it, you stated that Directive No. 77 was revoked or terminated on the 13th of September, 1945? Look at that and let me finish my question. (Witness examines document.) I believe that is Federal Register [fol. 356] which shows September 14, 1945 effective August 14, 1945, and shows issue date of September 13, 1945?

A. 3. That is correct.

X Q. 4. Whereas, Executive Order 9276 as amended by Executive Order 9319, was not terminated until May 8, 1946, by Executive Order dated May 3, 1946?

A. 4. That is correct.

X Q. 5. In order to avoid confusion that I have in my mind, and maybe in this record, what was the difference between terminating Directive 77 and terminating Executive Order 9276?

A. 5. Terminating Directive 77 released the controls. However, the Petroleum Administration for War continued to function until the 8th of May of 1946, in order to clean up a lot of the work that someone had to wind up, and they had a very small staff left to complete the Aviation Program. Actually they could not complete all of the claims that were outstanding, and so that responsibility was transferred from the Petroleum Administration for War to the Army-Navy Petroleum Board, and the Army-Navy Petroleum Board, which is now the Munitions Board Petroleum Committee, are presently winding up that program. We are still working on it.

X Q. 6. The point I am making is this, from and after

August 15, 1945, there was no control over aviation gasoline?

A. 6. That is correct, sir.

XQ. 7. Petroleum Aviation for War, or PAW——

A. 7. Administration.

XQ. 8. Petroleum Administration for War and APPAC were two separate and distinct agencies?

[fol. 357] A. 8. That is correct.

XQ. 9. APPAC operated under the combined Chiefs of Staff?

A. 9. Yes sir.

XQ. 10. And APPAC, if I understand your testimony, was the agent for—or authority—allocating or directing who should use all of the 100 octane gasoline and some of the 91 octane?

A. 10. No. All aviation gasoline and components thereof is defined by Directive 77.

XQ. 11. What would that include, would it include gasoline of a lesser octane than 91?

A. 11. That included 87 octane and any base stock that would go into the production of 87 octane, 91 octane or 100/130.

XQ. 12. Then were there any petroleum products that were not under the supervision of APPAC?

A. 12. Yes, there were petroleum products that were not under the supervision of APPAC. APPAC controlled the components that would go into aviation. However, asphalt or motor gasoline, that was under OPA. We had no control over that.

XQ. 13. Any gasoline that was used by the airlines, civilian airlines, then, was under the control of APPAC?

A. 13. That is right, sir.

XQ. 14. The Combined Chiefs of Staff allocated to the civilian airlines the gasoline they could use, is that correct?

A. 14. Through the Aviation Products Allocations Committee, as their agency.

[fol. 358] XQ. 15. That is APPAC?

A. 15. That is right.

XQ. 16. And likewise any other civilian, Army, Navy use, whether in this country or in Russia or any of the other allied countries?

A. 16. That is right sir.

X Q. 17. To whom did APPAC issue its allocation directive?

A. 17. They sent out copies of the quantities released to the using service or to the airlines or to the motor manufacturers. A regular form was used that we had for those released.

X Q. 18. Then did the airlines or the Air Corps simply take that form that you had sent out to them to the refinery and say; "This is now my gasoline?"

A. 18. No. The Petroleum Administration For War would send out a telegram to each refinery in the United States, authorizing release of gasoline purchased from Defense Supplies Corporation, "X" quantities, to the consumers. PAW notified the refineries that they were to release by refinery location.

X Q. 19. Until the refinery had received that telegram or official notice, was it necessary that they retain that gasoline at the refinery?

A. 19. At the time the gasoline went in the storage and the quantity was determined, the Air Force People, at the time it was turned over to the Air Force Inspector, usually he had his instructions from the Air Force. I don't know [fol. 359] too much about how that part worked. Some of the other witnesses know more of that detail on that than I do.

X Q. 20. I got a little lost with you, so lets go again, please. At the refinery the gasoline is refined and who advised then APPAC how much gasoline was there refined as 100 octane?

A. 20. Petroleum Administration for War advised APPAC the estimated quantities that were going to be made available for the following month.

X Q. 21. They advised them in advance?

A. 21. That is right.

X Q. 22. What was to be expected?

A. 22. That is right.

X Q. 23. Then did APPAC then make their allocations, or did they wait until the gasoline had been refined to make their allocations?

A. 23. No, it was all done on an estimate, and they would

allocate on an estimated basis. Then if production increased or decreased, Petroleum Administration for War would make the proper adjustment and on practically every month the allocations were either decreased or increased. Certain theaters would have to decrease. Usually aviation training in the United States was cut back whenever we had a shortage, that is, from our estimated quantities.

X Q. 24. After that allocation had been made of estimated quantities, at that time did the PAW advise the refinery?

A. 24. That is right.

[fol. 360]. X Q. 25. The gasoline remained at the refinery after the allocation until the designated unit to use it went there to receive delivery, is that correct?

A. 25. That is correct.

Redirect examination.

By Mr. Green:

R. D. Q. 1. Mr. Stratton, in your cross examination, you made mention of allocations of 91 octane gasoline to airlines and engine manufacturers. Will you explain and describe the mechanics of the purchase of 91 octane gasoline by airlines and engine manufacturers?

A. 1. Engine manufacturers and airlines, each individual case even down to airplane numbers, gasoline was made available to them only after they were able to furnish the necessary information to APPAC that they were in essential war production, and they had to document with APPAC that information. Then APPAC would authorize release by whoever they wanted to purchase the gasoline from, and they would merely make their contracts with the producer with whomever they desired. We didn't name the source on that. Quantities were insignificant anyway, and we didn't designate the source of it.

R. D. Q. 2. If I understood your direct testimony, immediately upon production, gasoline went to the Government in certain instances?

A. 2. Yes sir.

R. D. Q. 3. On the 91-octane, they dealt directly with the refiner?

A. 3. That is correct.

[fol. 361] R. D. Q. 4. Upon allocation?

A. 4. Yes, sir.

R. D. Q. 5. Were there purchases by airline companies and motor manufacturers of 100 octane gasoline?

A. 5. Yes, sir.

R. D. Q. 6. Describe how that allocation was made and how that purchase was accomplished?

A. 6. We would authorize the company to repurchase from Defense Supplies Corporation.

R. D. Q. 7. You say you would authorize the company to "repurchase." By that "company" you mean the refining company?

A. 7. Yes, sir. We would authorize the refining company to repurchase gasoline from the Defense Supplies Corporation, in order to take care of this airline business and motor manufacturer business.

R. D. Q. 8. In short, before refiners could deliver 100 octane gasoline to an airline or an engine manufacturer having allocation, he had first, the refiner had first to purchase the gasoline from Defense Supplies Corporation?

A. 8. That is correct, because Defense Supplies Corporation owned all 100 Octane aviation gasoline.

Further Dépohent saith not.

Paul C. Stratton, By T. Roy Hix.

Sworn to before me when taken, the 13th day of April, 1950. T. Roy Hix, Notary Public. (Seal.)

My commission expires April 6, 1954.

[fol. 362] Deposition of W. Randolph Pietsch

The next witness, W. Randolph Pietsch, being first duly sworn, deposed as follows:

Direct examination.

By Mr. Green:

Q. 1. Will you please state your residence and present occupation?

A. I live in Washington, D. C. I am a resident of

Nevada. My present occupation is temporary indefinite. I am in the office of the Secretary of Defense with the Munitions and Petroleum Committee and the policy division thereof.

Q. 2. When did your first association as an employee of the federal government begin?

A. In January, 1943.

Q. 3. Will you describe the positions you have had and the successive positions up to the last one stated?

A. From January, 1943 until July, 1943 I was Assistant Civilian Supervisor of the Allocations and Requirements Unit of the Fuels Branch of the Air Service Command with headquarters at——

Q. 4. Where was that command?

A. At Patterson Field at that time. Later it became Wright Field.

Q. 5. Will you explain for the record how Wright Field and Patterson Field are distinguished?

A. They are adjacent and the actual headquarters is between the two fields.

Q. 6. How long did you remain there?

[fol. 363] A. I remained there until May, 1946 and during that time from July, 1943 to May, 1946 I was Supervisor of the Allocations and Requirements Unit.

Q. 7. Now, the allocations branch or unit which you mentioned in your testimony, did that have anything to do with the allocations testified to by Mr. Stratton by the APPAC?

A. It was directly connected with it.

Q. 8. I mean with the allocations of Wright Field——

A. They were a part of it. They had a share or they had a part of the allocations.

Q. 9. I will put the question this way. Will you describe the duties and responsibilities of your position at Wright Field?

A. As Supervisor of the Allocations Unit my responsibility was to plan, coordinate and control the allocation of aviation gasoline for the Army Air Forces in the continental United States. That control is exercised or done in the name of the military officer. However, at the time

I was in that position I had eleven different military supervisors so the actual responsibility rested primarily on me.

Q. 10. Now, describe in your own way what you did.

A. Yes, sir. At the time an allocation was made by APPAC I received notice from PAW, Petroleum Administration for War and from headquarters of the Army Air Forces in Washington simultaneously of the allocation. The Air Force notification was through their representative on [fol. 364] APPAC. The notification that came from PAW was in the form of what we at that time termed refinery assignment sources. In other words, it was broken down by quantity and by grade of product. When we had received that or the assignments or sources from PAW under the allocation which had been made by APPAC we started planning distribution of the products during the succeeding month. This planning, which started about the 10th of the preceding month, was on a basis of what the different Air Force commands within the continental United States had submitted to us. Those requirements generally were considerably in excess of what was later allocated. We would screen those submitted, for headquarters Army Air Forces and at the time the allocation was made headquarters Army Air Forces would advise us what would be allocated to each Air Force command.

To clarify that a little bit, these Air Force and commands were not alloted aviation gas geographically. In other words, there may have been two or three operating at one field. The Air Transport Command operated through Memphis but they also operated at some training bases. Fuel consumption against these allotments was a matter of statistical record whenever the issue was made and consolidated in reports that came in three times a month to Wright Field; and the consumption was reported country-wide. We had a consumption sheet made so that we could on the 10th of a given month know whether a command was exceeding its rate of allotment. In other words, if their allotment was 300,000 barrels for the month and they had [fol. 365] used 150,000 by the 10th, it was our job to get hold of the Army Air Forces and they would issue orders to dot down on the fuel for that command but not at any particular air field.

The reason for all of this background is to explain why we had to use certain controls with a certain amount of flexibility for the early forwarding of advice from Washington as to change in the general plans, because aircraft can move around a lot faster than we could move a tank car of petroleum products. After we got or at the same time practically that we had been notified what the allotments of each command were, we then estimated the requirements of each command at each of these air bases and where there were two or more then we totaled it so we would have a rough idea of what would be consumed. We used work sheets along with maps to plan this distribution system and when we received the refinery assignments from PAW we would so map it geographically so that we would avoid cross hauls or unusually long hauls of the requirements as estimated by the commands and for the activities that we would have supplied at these assignment sources that PAW had made to the refineries. In addition, during most of the war time because of the shortage of tank cars and because of the location of the refineries we were limited in certain areas so that frequently we had to make terrifically long hauls maybe at times or something of that sort; and in order to conserve tank cars and aso to provide a better distribution system the Army Air Forces leased terminals, particularly river terminals on the Mississippi, Ohio, and other rivers. Those terminals were part of the [fol. 366] distribution system. They acted as surge tanks in instances. For example, if activity at one field were to increase and if you had a certain amount of stock on hand there which would cover the gap, in the event you didn't have barges coming in to take care of that increased requirement, in the interim period you would probably have time to ship that from another terminal by truck or from the refinery by tank car. It provided your flexibility on the supply lines. Now, when we had matched up our estimated requirements with our refinery availables and also taken into consideration what stocks we had in terminals and enroute to terminals this allocation unit coordinated with the distribution unit at Wright Field; who controlled distribution that had been planned.

We completed this plan and it was in the form of sheets

such as you have in one of the exhibits here that we attached to the releases. I can't identify the exhibit at the moment but there are several of them there. Those sheets were approved and initialed by someone in the distribution unit and also in the terminal unit because the terminals had to be taken into consideration in this pattern distribution pattern. When this work had been accomplished and when the distribution people——

Q. 11. Right there, when you say distribution people, whom do you mean?

A. Well, Mr. Thompson and Mr. Bradley, both in the distribution unit at Wright Field.

When they had approved this planning worksheet then [fol. 367] within a space of forty-eight hours I generally got on the telephone with Mr. Stratton or Mr. Akers, who worked with Mr. Stratton in PAW, and in the space of an hour or so told them just how we planned to distribute. They were generally familiar with the location of the Army Air Fields and they would sometimes make some suggestion of changes. Sometimes Mr. Stratton and Mr. Akers would come out to Wright Field in person rather than try to conduct this by telephone—it got so complicated—and usually bring representatives of the Office of Defense Transporation. They would usually do this about the 25th or 28th of the month.

Q. 12. Will you explain why the Office of Defense Transportation participated in those conferences?

A. Because the Office of Defense Transportation controlled the supply of tank cars, as I understand it, and the Petroleum Administration for War worked with them trying to get cars for petroleum products.

Q. 13. Were they interested solely because of the fact that they controlled the tank cars or did they have an interest in the cross hauling?

A. They had a definite interest in cross hauling and conserving tank cars, and also at that time, through regulations, we could not use tank cars for a haul under two hundred miles.

Q. 14. Now, go ahead.

A. We would sit down with these representatives with large maps on the wall on which this whole distribution

[fol. 368] plan had been outlined and it was outlined in this manner, by using different colored strings from each refinery source. We had it planned, the supply from the refinery and similarly from the terminals.

The reason for this control, or another effect of this control rather, on the Air Forces was, we were not permitted to ship from a certain geographical district into another one without the approval of the PAW and the ODT so that in our plans if we found that it was necessary to do that, we had to justify it by planning shipment in that manner. When they had approved this distribution plan we generally telephoned the refinery or its head office and also generally the terminals and notified them about all the activity allotment releases during the following month. That usually occurred around the 28th, 29th, or 30th. Those notifications were confirmed by release form. We had a covering form of letter that spelled out specifically what the contractors were permitted to do or limited from doing. Those forms did not generally reach the contractors until possibly the 3rd, 4th or 5th of the month but they started shipment on the basis of our authorized telephonic release, plus any action taken by the supply officers at the fields that were authorized, because we didn't order shipment. We only authorized release on call of these other activities.

Now, one other point that should be made clear. In this release of this plan so that the contractor, the refineries could plan how this product was to be shipped, indicated [fol. 369] the type of delivery that was to be made on this release form, whether by tank truck, tank car or for water loading. They also advised the Air Forces transportation people that the ODT had authorized whatever type of transportation was required. It allowed the refineries to store the finished product in the type of loading tanks that were necessary. In order for water lifting it may be an entirely different tank to what they would have if they were loading tank cars or trucking it down to New Orleans. The quantities that were set up for water loading were only as indicated by the quantities on these various sheets. These quantities were not strictly limited but they were limited to this extent in that the people that took over the

actual movement of the product to be moved by water, the distribution unit at Wright Field, they arranged for the transportation of the product and they determined actually the quantity to be loaded. If for some reason an air field would be extra busy, the distribution people would come to us and call for a release of an extra 10,000 or 20,000 barrels. That might make us in short supply of the quantity we had available to supply from that particular refinery. In other words, there would be a re-shuffling all the way through. That is all I think of on that point.

Q. 15. Now, Mr. Pietsch, you in your testimony mentioned when you got an allocation and you said the refinery assignment. What do you mean by the refinery assignment?

A. Well, it was an assignment by PAW of the source [fol. 370] of supply with the quantity, type of the product, for lifting from that source during the month designated.

Q. 16. Did the fact that a given terminal was operated by a particular oil company mean that the assigned refinery would be the refinery of the company operating the terminal?

A. No sir. In fact, further than that, on this release we did not designate what terminal the shipment might be made to. The distribution people determined, when they came to the actual shipment, whether you got a barge and that sort of thing and the point they would lift from but no consideration, as far as I know, was ever given to who the owner of the terminal was or the refinery because all government movements were on what we call the logistic basis, the shortest and most economical haul.

Q. 17. You mean to say that because the Memphis Terminal involved in this case was operated by the Standard Oil Company of Louisiana that did not mean that the Standard Oil Company's refinery or any one of its refineries did know who would be the assigned refinery in the allocation in each case?

A. No sir. In fact, the allocation did not extend as far as the terminal.

Q. 18. So the PAW not only told you the gallons you could obtain but where you would obtain it?

A. Yes sir.

Q. 19. You determined the terminal into which it would go?

A. Yes. The PAW had nothing to do with determining the terminal.

[fol. 371] Q. 20. In your testimony you have discussed at some lengths transportation and your arrangements made for transportation from the assigned refinery?

A. Yes.

Q. 21. Who arranged for the transportation, the government, refinery or who, if neither of them?

A. Mr. Green, I believe Mr. Bradley would be a better man to answer that, because that goes beyond where we dropped the ball. We drop the ball at the point where the refinery had been authorized or the terminal operator had been authorized to release.

Q. 22. In your testimony you said the government selected the transportation. I believe I am quoting you correctly.

A. We designate the type of transportation in coordination with the distribution unit and so on.

Q. 23. Mr. Pietsch, you have described how the PAW assigns the refinery and that was on the basis of an allocation to the Air Force?

A. Yes.

Q. 24. You have also described how you allocated it at Wright Field. I don't like that word, but you made up a prospective distribution plan to the fields?

A. Yes.

Q. 25. Did it always occur that the Air Forces took out of the refineries all of the gallonage allotted to them in a given month by PAW?

A. No.

Q. 26. What happened to the gallonage which the Air Forces did not lift in a given month from the assigned refineries?

[fol. 372] A. Generally, as I understand it, the Petroleum Administration for War was notified of that by the refineries and it was taken into account on the succeeding month's allocation. We lost it except in a few instances where it was of vital importance to us, because we couldn't get the barges loaded out of the refinery. Say it was sched-

uled for the 30th or 31st of the month and they were delayed a day or two, then PAW would give us what we call a "carryover" allocation so that these barges could be loaded. In these instances it might be a few thousand barrels and, as I understand it, from PAW's point of view it was considered as available for the succeeding month's allocation.

Q. 27. Just merely for clarification, upon what authority did the refinery or did the gasoline move from the refinery following the allocation? Did it move on the allocation or assignment made by PAW or did it move by direction of the Air Forces?

A. It moved on the basis of both, one succeeding the other, the assignment made by PAW, then the authorized release from Wright Field, and third, the actual order for a specific number of gallons placed by an officer at an air field or by Wright Field. Those were specific orders for specific quantities billed against the allocation of the refinery.

Q. 28. I hand you five photostatic reproductions of documents respectively numbered Complainant's Exhibits 10, 11, 13, 28 and 29, and ask you to look at those papers and state for the record what those papers are and for what [fol. 373] purpose they were used, and trace through, trace the papers from point of origin to where they ultimately went.

A. These papers were attached to a covering——

Q. 29. State what the papers are first.

A. There papers are in general fuel releases.

Q. 30. All, right, now go ahead.

A. They were attached to a covering letter of authorization sent to each refinery and each terminal operator who was under contract with the Air Forces at the beginning of each month. On these releases there was certain information such as date or month for which the authorization was made, grade of fuel, contract number, certain file numbers and information as to whether this was to confirm or notification has been already phoned to the refinery. In addition, the release stated to what activities the release was permitted, the address of that activity, estimated requirements of that activity for the month and the type

of delivery the refinery would be expected to make, whether in tank car, tank truck or into barge. It also stated on the release forms that went to the refineries what the PAW allocation, as it is termed here, was for the month. Actually that letter came in the form of an assignment to avoid confusion with the APPAC allocation but on the form it says PAW allocation. On the release to terminal operators there was no information on that line at all because there was no allocation to a terminal as such.

Q. 31. Now, was that conventional procedure?

A. Yes.

[fol. 374] Q. 32. Now, will you look at the documents labelled Complainant's Exhibits 10, 11 and 13 and state to whom those releases were issued?

A. Exhibit 10 was issued to the Standard Oil Company of Louisiana, address X-Baton Rouge refinery for the month of December, 1943." Exhibit No. 11 was issued to the Standard Oil Company of Louisiana, X-Baton Rouge, Louisiana refinery for the month of January, 1944. May I insert, "for grade 100" at the end of this statement? Exhibit 13 was issued to the Standard Oil Company of Louisiana, X-Baton Rouge, Louisiana refinery for the month of December, 1943 for grade 91."

Q. 33. Will you look at Complainant's Exhibit No. 13 and explain what the entry "water lift restricted to 5,838,000 estimated required gallons" means, and explain that?

A. The reason that water lifting was restricted was that the air fields that are listed above as also being supplied from that point, could be supplied by tank truck and we wanted to protect their estimated requirements in full in order to avoid the possibility that we might have to ship them by tank car from some more distant point, if a larger amount of the Grade 91 were to be lifted by water than we indicated under the restricted amount.

Q. 34. Then I take it that these three Exhibits respectively numbered Complainant's Exhibits 10, 11, and 13 are what are know as refinery releases?

[fol. 375] A. They are, sir.

Q. 35. And are releases to the refinery the papers upon which the amounts of the allotments at the refinery are accomplished to the Air Forces?

A. Yes, s

Q. 36. Now, look at Complainant's Exhibits 28 and 29 and state to whom they are directed and at what points.

A. Exhibits 28 and 29 were directed to the Standard Oil Company of Louisiana, ex Memphis, Tennessee terminal.

Q. 37. For what do they provide? Do not go into the detailed amounts.

A. For the release of grade 100 under Exhibit 28 and grade 91 under Exhibit 29 for the month of January, 1944 to various activities in the State of Tennessee and other states adjoining, various Air Force activities.

Q. 38. That is known as a release to the——

A. To the consuming installation, to the Air Forces installation.

Q. 39. And it goes to whom?

A. It goes to the terminal through the home office.

Q. 40. It is known as the terminal release?

A. Yes sir.

Q. 41. Now, on each of these Exhibits the following language appears: "Quantities shown are estimated requirements only but are not restrictive." Will you explain the meaning of those words and why those words were placed upon these documents?

[fol. 376] A. Those words were placed upon these documents because we don't restrict the quantities to be shipped to any individual activity, and in addition, the release in these two instances was made on the terminal. The product already had been purchased by the Air Forces and was beyond the allocation restriction, in order words, it was in the Air Force's possession, in the Air Force's pipeline being sent to the Air Force activities for Air Force consumption.

Q. 42. Am I correct in understanding your testimony when I undertand that these refinery releases of necessity were required to be supported by PAW allocations?

A. yes sir.

Q. 42. Without it——

A. No shipment could be made.

Q. 44. And that, in the case of terminal releases, it was a matter of sole determination within the Air Force as to where or how they would use that gasoline, subject to ODT requirements?

A. Yes sir.

Q. 45. And that these allotments are mere estimates projected into or the anticipated needs in the following months?

A. In the particular months, sir.

Q. 46. Now, changing the line of it for a moment, look at Complainant's Exhibit No. 10, which is terminal release of Standard Oil Company of Louisiana at X Baton Rouge and releasing water lifting of 1,080,000 gallons followed by the word "barge" and explain what that water lifting [fol. 377] to the barge means.

A. The water lifting was so indicated so that the refinery would place the product, when manufactured, in storage tanks that were readily available for loading on barge and so that the distribution unit at Wright Field would be prepared to make arrangements for the transportation at such time as they determined it was necessary to move that product to get it to whatever terminal they had scheduled it for in order to maintain the supply at that terminal for subsequent issue to the fields.

Q. 47. Mr. Pietsch, as I undertand it, you- office and yourself were more concerned with the logistics of the situation from the standpoint of availability of distribution?

A. Yes sir.

Q. 48. What was required of the Standard Oil Company of Louisiana under its so-called supply contract with respect to reporting gallonage and what-not?

A. Well, in making reports during most of the war period we received daily telephone information from each refinery through a reporting system of the Air Forces.

Q. 49. Wait a minute now. You misundertood me. I am not going into that phase of it. Under the Memphis terminal, what was the Memphis terminal's responsibility with respect to giving you information upon which you could make allotments of certain products?

A. That would be under Exhibits 28 and 29. Those are service contracts.

Q. 50. Yes sir. I say what was the responsibility of the Standard Oil Company of Louisiana under the service [fol. 378] contract with respect to keeping you advised?

Mr. Dodson: We object to that on the ground the contract is the best evidence.

(Off the record discussion as to different kinds of contract.)

Q. 51. What did the Standard Oil Company at its Memphis terminal do with respect to keeping your office advised or informed of the gallonage?

A. Our office received a report that was consolidated not only from this terminal but all others.

Q. 52. I am not going into other terminals. What I am trying to get at, did the Standard report how many gallons it received, how many it had on hand, and if so, how frequently did it do that? That is the question I want answered.

A. The Standard Oil Company reported daily to our unit and the terminal unit at Wright Field individually the opening and closing, less, if any, receipts and shipments by grade of product and also by destination.

Q. 53. Mr. Pietsch, from your knowledge of the performance of the service contracts which were involved in this case and your connection with that performance by the Complainant derived from your official position at Wright Field can you say with respect to the gasoline involved in this suit here proceeding under Rule No. 68050 that the gasoline was the property of the United States prior to and at the time of its importation into the State of Tennessee?

[fol. 379] A. Yes sir.

Q. 54. Can you say that none of it was refined, manufactured, produced or compounded within the State of Tennessee?

A. Yes sir.

Q. That none of it came to rest in Tennessee as the property of the Standard Oil Company of Louisiana?

A. Yes sir.

Q. 56. And that the United States was the owner of the gasoline at the time it was shipped from the refinery, transported and while it was being transported and when it was imported into the State of Tennessee?

A. Yes.

Mr. Dodson: The four preceding questions are objected to on the ground they are leading, first; and second, that the contracts between the federal government and the re-

finers and other handlers of the gasoline would be the best evidence as to the ownership and whether or not the gasoline came to rest and the other conclusions called for in the four preceding questions.

Mr. Green: Not by way of argument but merely for the sake of the record, it is stated the contracts involved in the evidence are not only alleged in the bill of complaint but they are admitted by the answer and that they will be at the proper time placed in the record.

Mr. Cummings: And the answers are objected to on the ground of immateriality.

[fol. 380] By Mr. Green:

Q. 57. You stated you can answer those questions?
A. Yes sir.
Q. 58. Whose property was it?
A. The United States Government.
Q. 59. At all the times which I have mentioned in the preceding questions?
A. Yes sir.

Mr. Dodson: We want to make the same objection to these last two questions.

Mr. Green: Now, for the sake of the reporter and for the sake of yourselves, I am going to ask similar questions and you can make the same objection and let it go to the questions which I will now ask.

Mr. Dodson: We make the same objection. Let the reporter show the same objection to these questions.

By Mr. Green:

Q. 60. Can you say that with respect to the gasoline that the Standard Oil Company of Louisiana, when it received gasoline at the Memphis terminal and in Memphis, Tennessee, that it had no interest or equity in or ownership of or any independent control over that gasoline?
A. Yes sir.

Mr. Cummings: Mr. Green, is the question directed to Exhibits 28 and 29?

Mr. Green: No, it is not. Now, the reporter can state the same objection you made before.

Mr. Dodson: That is correct. We make the same objection.

[fol. 381] By Mr. Green:

Q. 61. Did the Standard Oil Company of Louisiana, the complainant in this suit, have any interest in that gasoline?
A. No sir.

Mr. Cummings: Note objection to those questions on the ground that it is too vague to convey any information about that gasoline.

Mr. Green: Strike the question and the answer too.

By Mr. Green:

Q. 63. You said you could say and I will ask you if you will say, and the answer is yes, I will say, is that right?
A. Yes.

Mr. Green: And the same objection to the question as well as to the answer.

Mr. Cummings: Made as to the form of the question.

Mr. Green: Well, I withdraw the question.

Mr. Cummings: All right. That suits me.

Cross-examination.

By Mr. Cummings:

Q. X 1. Mr. Pietsch, these exhibits on the allocation and distribution and redistribution of aviation gasoline that you testified about previously, I believe you stated, were purely statistical exhibits taken on the basis of the forecasted production?

A. Not entirely. The part that was statistical was in the [fol. 382] Air Forces, with the Air Force commands. That part received from PAW was under directive from Headquarters of the Air Forces and from PAW and ODT restricting quantities and modifying movements.

Q. X 2. Was the available gasoline for your distribution and given by your Air Force distribution as allotted to you by APPAC or PAW, or both, a statistical figure or actual figure?

A. I am not quite sure of the distinction between the two. It was not a rough or round figure, if that is what you mean. It was an exact figure.

Q. X 3. I mean was the figure that was given you as part of the machinery that had to do with the distribution of Air Force gasoline a forecast on future production?

A. No sir.

Q. X 4. Or was it an actual figure on gasoline then in storage or to be produced?

A. That was on gasoline partly in storage and to be produced during that period and might be modified during that period on an assignment from other sources in the event the sources found their estimate was too high.

Q X 5. So it then was an actual figure and a statistical figure?

A. Yes.

Q. X 6. In other words, it comprehended any quantities that were in storage at the time the release or authorization was given to the Air Forces plus forecasted production for a month in advance, I believe?

[fol. 383] A. Yes sir. It was a continuous production line, you see.

Q. X 7. Now, I take it if you went to make your distribution that you could use whatever you had on the allocations and the other forms you had in the Air Force itself and also use the actual and statistical figures?

A. Yes sir.

Q. X 8. In the same manner that you received your figures from the top allocating body?

A. We did in two different ways, the statistical ones as shown on this Exhibit under estimated requirements by destination; the actual ones were to the Air Force and commands so that they could effect overall control of their consumption. Those were the actual limiting factors.

X Q. 9. Now, for example, on your exhibits—I believe it is 10, 11 and 13. Will you refer to them, please sir?

A. Yes sir.

X Q. 10. Do those exhibits necessarily refer to any actual gasoline of the aviation type in storage at the date of the issuance of the releases?

A. Those are the releases from the refinery?

X Q. 11. Yes.

A. We would have no way at Wright Field of knowing what refinery stocks were actually on hand, what working stocks.

X Q. 12. So then those were purely statistical in the sense that you were not operating upon some known quantity of available gasoline at the time releases were issued, is that correct, sir?

[fol. 384] A. Not quite, sir, because if you will notice on this line, PAW allocation so many thousands of barrels. It was, for our purposes at least, a real figure. It was limited to us.

Q. X 13. That is correct. You are referring to Exhibit No. 13?

A. 11 and 13. Both had that figure on it. It was left off of No. 10 inadvertently, I believe. That should have had it on there.

Q. X 14. 10 doesn't contain that?

A. No. It should have it on there but it was left off.

Q. X 15. I notice on Exhibit No. 11 there is no shipping address shown there.

A. On water lifting they show nothing. That comes out later, but if barges had been nominated by the distribution unit, they designate the destination, we don't.

Q. X 16. You didn't know where the gasoline was going at the time?

A. No, we just knew the overall terminal unit needed so much moved by water out to different terminals.

Q. X 17. The Air Force itself, I believe, leased terminals for the storage of gasoline?

A. Yes sir.

Q. X 18. Of the aviation type?

A. Yes sir.

Q. X 19. And did that in Tennessee?

A. Yes sir.

Q. X 20. And did it in Nashville?

A. Yes.

[fol. 385] Q. X 21. Did they lease any terminals in Memphis?

A. Yes.

Q. X 22. Those terminals were solely under the control

of the Army Air Force and only operated by the Air Force by some third party, is that correct?

A. Well, I didn't know the details of the contract as to the operation of the terminal itself. I know there was an Air Force inspector there. Whether he superintended the fields or what, or what happened, that part I don't know.

Q. X 23. You do know that these terminals were in addition to terminals that were regularly maintained under the service or lease contract, whatever you call it, with the various oil companies such as Esso Standard?

A. I don't quite understand your distinction.

Q. X 24. They were in addition to the contracts with the major oil companies, such as Standard, who used their own terminals for the storage of your gasoline.

A. I think all the Air Force contracts, so far as I know, for terminals were under what we call a certain type of lease. So far as I know, there was never military personnel that actually physically operated the terminal. I don't know of any in this country where they did that. It was civilian personnel.

Q. X 25. You do know that the Air Force leased for its own account various terminals in Tennessee, as you have testified a moment ago?

A. To be operated by some other party, by some party to a contract with the Air Force.

[fol. 386] Q. X 26. You said you knew one here in Nashville. Who operated it?

A. I don't recall now.

Q. X 27. You had one in Memphis. Do you recall who operated it?

A. Standard Oil Company of Louisiana, I believe it was.

Q. X 28. Did you lease one in addition to the Standard Oil terminal?

A. I don't know. That was not my province to lease terminals.

Q. X 29. In the beginning you did authorize the contracts between the owner of the terminal and the Air Forces, did you not?

A. That again is not something I am familiar with and that is not an allocation problem.

Q. X 31. Do you recall a Mr. Anderson of the Air Corps whose duty it was to go around and lease terminals for the Air Corps?

A. There was an Air Force officer by the name of Anderson, Captain or Major Anderson.

Q. X 32. Do you remember him?

A. Yes.

Q. X 33. Do you remember that he went out, for example, here in Nashville and leased a terminal from some oil company to be operated by the Air Corps?

A. I don't know whether he did or not. That was not in my field at all.

Q. X 34. I was not following you evidently on part of your [fol. 387] testimony, Mr. Pietsch, when you said that at the end of the month if the Air Force didn't take up a certain gallonage it was then available for redistribution or allocation.

A. Reallocation, yes sir.

Q. X 35. But assume that the Air Force had already bought the gasoline and had it stored.

A. Where?

Q. X 36. For example, in Memphis.

A. At which terminal?

Q. X 37. Of the Standard Oil Company. At the end of the month did that gasoline become available for redistribution or did it remain the property of the Air Force?

A. No, once the product had moved out of the refinery, it remained the product of the Air Corps.

Q. X 38. Would it be accurate to say that your testimony on that point simply meant that in case of an allocation which was not used by the Air Corps, that at the end of the month the allocation was redistributed but in the case of gasoline actually purchased for the account of the Air Force and had become the property of the Air Force, it never then was released, is that correct?

A. You mean released back to the——

Q. X 39. To the allocating body?

A. Not once it was the property of the Air Force.

Q. X 40. Referring to Exhibits 28 and 29, you were asked several questions not directly relating to those exhibits but on matters which are covered in part of these exhibits and

without waiving our objections to that part of your direct [fol. 388] testimony, I want to ask you if you can tell me whether those shipments authorized on exhibits 28 and 29 were actually made and in what amounts?

A. I have no specific knowledge as to what amounts or whether they were even made to all of those activities. Those were authorizations to make shipments if the activity called for them any time the activity called.

Q. X-41. These exhibits here, 28 and 29, purport to be authorizations only?

A. Yes sir.

Redirect examination.

By Mr. Green:

R. D. 1. Mr. Peitsch, in the discharge of your duties at Wright Field, as you have outlined them in your testimony, did you have anything to do with the procuring of facilities to be used by the Air Force?

A. No sir.

R. D. 2. You have no personal knowledge of the contracts involved in those situations, do you?

A. No.

R. D. 3. You don't know whether they were leased for Air Force operations or whether they were leased for contractors' operations or anything else?

A. Just indirectly through their Air Force personnel.

R. D. 4. All you know was that the facilities at Memphis were available to you and facilities elsewhere were available to you, is that right?

A. Yes sir.

[fol. 389] By Mr. Waller:

R. D. 5. Let me ask you a question, Mr. Pietsch. When you use the terminology "lease", that the Air Force leased tanks, did you have in mind the type of service contract that is involved in this case?

A. It is what we call colloquially a through-put contract.

R. D. 6. I want to finish what I was asking you. Did you have in mind any distinction between this type of service contract that is involved in this case and any other type

of service contract or what you have referred to as a through-put contract? When you used the term "lease" did you have in mind any distinction?

A. I did to this extent, that there were other companies doing service consisting of putting the products actually in the aircraft of the Air Force. That was what we generally call a service contract. This was considered a terminal contract or through-put contract.

R. D. 7. And that was the type of contract you had in mind when you used the term "lease"?

A. Yes sir.

Recross-examination.

By Mr. Cummings:

R. X 1. Mr. Pietsch, for the purpose of this question I do not have in mind the service type of contract involved in this suit. I want to inquire again whether you know of your own knowledge if the Air Force leased terminal [fol. 390] facilities, and tanks from third persons and operated them itself with its own employees or employees who were responsible to the Air Force, not mainly and entirely different from the service contracts involved in this suit.

A. You mean government employees?

R. X 2. Yes sir, or civilian employees, whether they be Army of civilian.

A. I mean employed by the government though, on the government payroll.

R. X 3. Yes sir.

A. I don't recall any in the continental United States.

R. X 4. Now, let me take one further step with your Exhibits No. 28 and 29. I forgot to ask you about this. We have covered the matter of what happened to aviation gasoline once it was purchased for the account of the Army Air Force. What happened to allocations such as these reflected in Exhibit 28 and 29, once they were made to such places as Berry Field or Smyrna or other points such as shown here in these exhibits. Were they subject to redistribution at the end of any given period or not?

A. You refer to these quantities shown in all of these columns?

R. X 5. Yes sir.

A. These were not fixed quantities. They were estimated for the terminal operators' benefit and also for the transportation people's benefit in planning for the month. That was based on the information we had received from the Air Force and commands but they were not fixed quan-
[fol. 391] tities and were subject to fluctuation. However, the activities as listed were limited. In other words, no activity not listed could order from this particular terminal operator.

R. X 6. Now, let's take a specific example. I believe I can make myself a little clearer. We will assume that Exhibit No. 28 is to be interpreted as authorizing Berry Field at Nashville, Tennessee for the month of January, 1944 to have 84,000 gallons of aviation gasoline. Do you interpret it that way?

A. Have a requirement for 84,000.

R. X 6. Authorized?

A. Authorized for that, or more or less.

R. X 7. More or less.

R. X 8. I can see the less. Now, authorized for more, explain that.

A. It says at the top of the column "Estimated requirements—gallons" and under that "For Berry Field, 84,000." If because of the re-shuffling of aircraft by whatever command was at Berry Field at that time they had to put additional aircraft in or required more during that month, more aviation gas, the supply officers at that field could have, if necessary, called for 20,000 or 30,000 gallons more than we indicated.

R. X 9. And you would have issued another release, wouldn't you?

A. No, they were not restricted, and so we should control it but if is a very difficult thing to understand, I know. We had to work it out. When we saw from these daily reports that came in that certain activities were increased
[fol. 392] and some others probably would be decreased but seeing in a given area that the whole area was increased then we would have to make provision to supply the product in that area from the refinery sources either by truck, tank car or possibly load another barge some place on the Mississippi and get it into Memphis so as to have the prod-

get available to cover those increased requirements. Overall there was still there in the Air Force so much gasoline but we could shift that to this point which required, subject to ODT and so on, so long as we did not exceed our overall allocation and each command had to keep within its command allotment at whichever airfield they operated. They could operate at any airfield and they were supposed to give us notice for planting purposes so that we could get the transportation lined up but sometimes it was hard to keep a jump ahead of them.

R. X 10. Mr. Peitsch, I am not going to ask you any more questions about the figure 84,000 on Complainant's Exhibit No. 28, and I now understand fully why you stated you could not state whether any of these amounts there were ever shipped or where to.

Re-redirect examination.

By Mr. Green:

R. R. D. 1. Mr. Pietsch, what was that example you just mentioned off the record?

A. An example of why we do have to have these flexible controls and why we could not limit the quota at any particular field was the way the Air Force had to operate and [fol. 393] that complicated things tremendously. For example, I stated about Berry Field. That is one but a definite one is Rapid City, South Dakota. At that field they had a 300,000 gallon storage for aviation gasoline. They burned about 100,000 gallons a day. A snowstorm would hit and tank cars would begin to pile up and they couldn't unload them because of the limited storage and they had a million gallons, I guess, on the rails all the time because the source of supply was generally St. Louis, a ten-day haul away. So Rapid City, whenever that situation arose, would get on the telephone and say: "Help us. We have got all this fuel coming in and no place to put it and we can't fly," so the distribution people at Wright Field would get busy there and divert these cars to other activities either south or west, points that they were still flying and had storage for it.

R. R. D. 2. I hand you a statement which bears at the head of the column, the fourth column from the left "Estimated

required gallons" and the statement at the bottom of each of Exhibits 28 and 29 "Quantities shown are estimated requirements only and are not restricted."

A. Yes sir. In addition, in a covering letter to which this was attached, I believe there is some similar statement.

R. R. D. 3. Does any such or comparable language appear on Exhibits 10, 11 and 13?

A. It does on Exhibit 13. On Exhibit 11 it was not necessary because the top, in the upper portion of that Exhibit where it says "PAW allocation 24,000 barrels," that quan-[fol. 394] tity is identical with 1,008,000. On No. 10 as I said before the PAW allocation was evidently left off inadvertently but the refinery would have been unable to ship more than 1,092,000 gallons altogether because PAW only authorized that much.

By Mr. Cummings:

R. R. D. 1. So somewhere, Mr. Pietsch, there is a record, I take it, that would show what was actually shipped?

A. Yes sir, I think some of the other witnesses will be able to give you that.

Further deponent saith not.

W. Randolph Pietsch. By W. Howard Fish.

Sworn to before me at the time taken. W. Howard Fish, Notary Public. (Seal.)

[fol. 395] Deposition of C. E. Bradley—Filed October 30, 1950.

C. E. Bradley, being first duly sworn, deposed as follows:

Direct examination.

By Mr. Green:

Q. 1. State your residence and present occupation, Mr. Bradley?

A. 1. My residence is Dayton, Ohio, Route 1. Do you mean my present occupation?

Q. 2. Yes.

A. 2. Supervisor in charge of Requirements and Distribution of Aircraft Fuels and Oils, Wright-Patterson Air Force Base.

Q. 3. How long have you been at Wright Field?

A. 3. Since March 15, 1942.

Q. 4. Have your duties at Wright Field been the same from 1942 up to the present time?

A. 4. No, there has been some change.

Q. 5. Will you state the various duties at Wright Field beginning from the time you first went there, up to the present time?

A. 5. At first I was put in the Terminal Facility, from the beginning of the time up until in 1946, at which time I was more or less worked into my present job.

Q. 6. What were your duties and your responsibilities during the periods involved in this suit?

A. 6. My duties were at that time to maintain service [fol. 396] of various facilities throughout the Continental United States for the handling of aircraft fuel, and the various things that the facilities had in the way of loading various products and receiving of the products and the cost of operation.

Q. 7. Did your duties embrace, the ones which you have stated, the responsibility of procuring and controlling the use of facilities for aviation gasoline?

A. 7. When we had trouble in a given location, or where we wanted to improve the distribution setup, I made arrangements whereby we made service in various parts of the country for various facilities, and you might take Memphis, for example, it afforded additional facilities here for the handling of aircraft fuel, giving us water inbound transit and going out by tank car and tank truck. Part of my duties were to locate such storage and all of our facilities, terminal facilities, and what they could furnish and what they could give us in the way of loading trucks, hours of service, and I have to make the preliminary steps to try to obtain those to put them under contract.

Q. 8. Mr. Bradley, I hand you seven documents, respectively marked Complainant's Exhibits 1 through 7 both inclusive, which purport to be contracts between Standard Oil Company of Louisiana, and the United States, bearing

dates as respectively appear thereupon, which purport to be the contracts mentioned in Article III of the Bill of Complaint, in sub-paragraphs (b) and (c). Are you familiar with those contracts?

[fol. 397] A. 8. Some of them.

Q. 9. Will you indicate which ones you are familiar with?

A. 9. This one.

Q. 10. Will you examine those documents I handed you and respectively marked Complainant's Exhibits 1 through 7 inclusive and state which of those, by number, you are familiar with?

A. 10. I am familiar with Exhibits 2, 4, 5, 6 and 7.

Q. 11. Will you state what those contracts are?

A. 11. These contracts are service contracts for the handling of Government-owned fuel to certain facilities.

Q. 12. Between the Standard Oil Company of Louisiana and the United States?

A. 12. Yes.

Q. 13. At that time, if I remember right, we were completing arrangements with—I take that back. We were attempting to find out from Standard Oil Company at Memphis what time the Lion Oil Company tanks, which we made arrangements for, which were placed under Standard Oil Company by agreement, would be ready for occupancy, and the Government had instructed the Standard Oil Company to make certain Lion connections, connecting the Lion Oil Company tanks into their system whereby the Standard Oil Company could handle the fuel to and from these tanks in connection with the other contract.

Q. 14. Which contract did you have in mind when you said, "the other contract", the Standard Oil contract?

[fol. 398] A. 14. We had an operating contract with the Standard Oil Company at that time for the operation of their terminal, and by their taking over Lion Oil Company's contract, I believe necessitated an additional contract for those three tanks for that short period of time. That is, up to the end of our fiscal year.

Mr. Dodson: He is referring to a prior contract, and as to that contract. What is that contract?

Mr. Green: That is what I am trying to get straight now. I am in the dark as much as you are on that.

By Mr. Green:

Q. 15. The contract which your mentioned then, is that the contract between you, the Government, and the Standard Oil Company in that collection of documents before you?

A. 15. Yes sir, I believe it is. Just a minute. (Examines document.) Here is the contract I spoke of.

Q. 16. What exhibit is that?

A. 16. Exhibit No. 2.

Q. 17. That contract was the one that you say was in effect in January, 1944?

Mr. Cummings: Are you referring to Exhibit 2?

A. 20. That is right.

Q. 21. Will you look at Exhibit 1 and tell us if you can, whether or not that is the contract which you had in mind?

A. 21. No sir, it is not.

(Discussion off the record.)

[fol. 399] Q. 22. Mr. Bradley, will you look at Complainant's Exhibits 1 through 7 inclusive and tell me whether you are able to say which of those contracts were between the Standard Oil Company of Louisiana and the United States and in effect during the month of January, 1944?

A. 22. January what?

Q. 23. January 1, 1944, or any part of January, 1944. Can you look at those contracts and tell me if those are the contracts that were in force during the month of January, 1944?

A. 23. Yes sir.

Q. 24. Will you tell us how those contracts are identified? By that, I mean Complainant's Exhibit 1, 2, 3, 4?

A. 24. Complainant's Exhibit Nos. 1, 2, 3.

Q. 25. Will you look at the remaining number of those exhibits, being Exhibit 4 through Exhibit 7, and tell us if those contracts between Standard Oil Company of Louisiana and the United States were in effect at subsequent times, during the year 1944, and 1945, and 1946, up to and including June 30, 1946?

A. 25. Yes sir.

Q. 26. Will you look at Exhibit No. 3, and tell us what facilities are covered in that contract?

A. 26. The facilities covered in this contract are necessary terminating, handling of the fuel in and for the necessary facilities for handling it out.

Q. 27. At what points?

A. 27. Johnson City Municipal Airport, Johnson City, Tennessee.

Q. 28. And where else?

A. 28. You mean location?

[fol. 400] A. 29. Yes.

A. 29. Johnson City, Tennessee and—wait a minute, there is another one here, Knoxville Municipal Airport, Knoxville, Tennessee. That is practically the same service.

Q. 30. Are you familiar with the operations under that so-called Knoxville contract?

A. 30. I am not as familiar as I should be.

Q. 31. That is all right, then. You mentioned certain Lion facilities in your testimony. Will you tell us your official connection with the Lion facilities and the developments there from the contract now before you marked Complainant's Exhibit 2?

A. 31. It all came about by not having enough terminal facilities in the Memphis area to handle the amount of fuel the Government cared to put through this area, and as the result of a survey, it was finally found out that Lion Oil Company could make additional terminal facilities available to the Government, but they had no way to operate the same. In other words, during the war, they were lacking personnel available for handling of these facilities. Arrangements were made with Lion to obtain these tanks and——

Q. 32. Who were to obtain the tanks?

A. 32. When it started out, the Government would obtain the tanks, but inasmuch as we could not work the contracts that way for the servicing of the entire operation, the matter was taken up with the Standard Oil Company to see if they would operate the facilities, since they already had manpower on their side to operate the tanks. Such ar-

[fol. 401] rangement was made.

Q. 33. What do you mean, "such arrangement was made"? Describe the arrangement?

A. 33. Arrangement was made with the Standard Oil

Company whereby they would take over the tanks of Lion Oil Company for the Government, and operate the tanks as directed by the Government of the fuel going in and out.

Q. 34. How did Standard Oil Company obtain possession of the Lion Oil Company's tanks?

A. 34. The Government, after they made the agreement with Lion, Standard Oil Company went and finished the agreement direct with Lion and themselves.

Q. 35. What was the agreement?

A. 35. That Lion would turn over the tanks.

Mr. Cummings: Can the record show that the witness is referring to Exhibit 34?

Mr. Green: Yes, that is right.

The Witness: That was the only way we could operate.

By Mr. Green:

Q. 36. I take it that Standard leased Lion's facilities?

A. 36. That is right, for the benefit of the Government.

Q. 37. Did you participate in that arrangement?

A. 37. In the early arrangement, yes sir, we did.

Q. 38. And that lease is an exemplification of what came out of your efforts by way of negotiation?

A. 38. Yes.

[fol. 402] Q. 39. Have you seen the original of that, or do you know anything of the original of that?

A. 39. This, you speak of? (Indicating document.)

Q. 40. Yes.

A. 40. I don't know of the original. I know that one existed.

Q. 41. That is Exhibit No. 34?

A. 41. Yes.

Q. 42. Did your Department have anything to do with the purchase of gasoline?

A. 42. No sir.

Mr. Waller: No questions.

Cross-examination.

By Mr. Dodson:

X Q. 1. Mr. Bradley, you have referred to Exhibit 1 through 7, Complainant's Exhibits 1 through 7; and have

identified those. Is that the type of contract that was generally entered into when the Government wanted to store gasoline or the Air Corps wanted to store gasoline?

A. 1. You mean a service contract?

X Q. 2. Yes.

A. 2. That is right.

X Q. 3. There were others and different types of contracts entered into in some instances, were there not?

A. 3. Yes, these contracts in those days were more or less "boiler plate." They didn't fit, they were new and had just started in. They used the same type of contract for practically all service contracts. One thing don't get confused, these contracts here are service contracts. [fol. 403] They are for the handling of aviation fuel. They are not to be construed as production contracts. They are what we buy fuel upon.

X Q. 4. In some instances the Air Corps entered into agreements where it took over the terminal completely; did it not, and operated the terminal?

A. 4. You mean the Government operated it?

X Q. 5. Yes.

A. 5. No sir, I do not know that.

X Q. 6. Then you are not familiar with the Ingram Terminal here in Nashville?

X Q. 7. Which?

X Q. 8. Ingram Terminal here at Nashville?

A. 8. I have remembrance of the Ingram Terminal in Nashville.

X Q. 9. Do you have a copy of the contract that was entered into in that particular case?

A. 9. I don't believe I have it with me, but I think it is called the River Terminals Company, that it is operated under.

X Q. 10. Is that contract the same type as these contracts?

A. 10. Yes.

X Q. 11. I wonder if you would furnish that contract, Mr. Bradley, as an exhibit to your testimony?

Mr. Green: If you will get the number.

A. 11. I imagine we could produce one if we had the number.

[fol. 404] By Mr. Green:

Could you go back in your records and find it?

The Witness: I imagine so.

By Mr. Dodson:

X Q. 12. Will you obtain that and furnish it to your counsel for filing, furnish it to Mr. Waller as Counsel for Complainants, to be filed as Defendant's Exhibit No. 1 to your cross-examination?

A. 12. Yes sir.

(Document to be supplied and filed as Defendant's Exhibit 1, Witness Bradley.)

X Q. 13. Mr. Bradley, look to your Exhibit No. 1, Complainant's Exhibit No. 1. That contract was executed December 30, 1943, is that correct?

A. 13. According to this, it was.

X Q. 14. Well, you say, "according to this, it was," you don't insist that this is not a correct copy, do you?

A. 14. No sir.

X Q. 15. Then why the qualification on your answer, please sir?

A. 15. I don't know why I made that statement. That was just verbiage, I guess.

X Q. 16. Refer to your Exhibit No. 2, please sir. Page 2. That contract was entered into on June 22, 1944, was it not?

A 16. Let me clear something here.

Mr. Green: Answer yes or no, and than clarify your answer.

The Witness: Yes sir.

[fol. 405] By Mr. Dodson:

X Q. 17. You made the statement that it was in effect prior to that time. If you will, explain from what you draw that conclusion?

A. 17. Because on Exhibit A to the contract, on Page 1 of the Exhibit, "The Contractor shall provide storage facilities in the capacity at the location, during the period and at the monthly use price indicated below: Tank Nos. 1, 3, and 3; for the period of time on or about January 9, 1944 through June 30, 1944."

X Q. 18. Then had the Government and Standard Oil Company been operating under an agreement that was later reduced to writing?

A. 18. No, I do not know the correct procedure, but they evidently gave them a letter of award until the contract could be performed or executed in its entirety.

X Q. 19. This contract was a storage contract, is that right?

A. 19. It was a terminal contract.

X Q. 20. Did it provide for storage?

A. 20. Yes it did.

X Q. 21. Now, Exhibit No. 3 is another one of these contracts, but that was not at the Memphis Terminal, is that correct?

A. 21. That is right.

X Q. 22. That contract was entered into on the 14th day of January, 1944?

A. 22. That is right.

[fol. 406] X Q. 23. And it was for storage of Government gasoline at Knoxville and Johnson City?

A. 23. It says here, "for the handling."

X Q. 24. I want you to look then to Page 1, Article I, and see if it provides for storage and handling.

A. 24. As I said before, these contracts were "boiler plate." They were made to fit all agreements all the way through. Each contract was not made to fit certain instances. That is the reason Exhibit A to these contracts was placed on these contracts. Exhibit A is a part of the contract.

X Q. 25. Then actually Complainant's Exhibit 3 was not the contract that was entered into between the Government and the Standard Oil Company, is that correct?

A. 25. It is an agreement between the Standard Oil Company and the Government, Exhibit 3 is.

X Q. 26. Doesn't that contract that you are referring to provide that the contractor, Standard Oil Company of Louisiana "Shall receive, store, handle, and load government owned fuel"?

A. 26. That is considered a service contract.

X Q. 27. I didn't ask you what it was considered, if you will pardon me, Mr. Bradley. I asked you what it provided

for. I asked you if it didn't appear in the face of it that that is its purpose, on Page 1?

A. 27. I was going by the exhibit. That is what it says here, yes. I was reading the exhibit.

X Q. 28. Mr. Bradley, there was a contract entered into between the Standard Oil Company and the Lion Oil Com-
[fol. 407] pany, concerning the terminal faciilities at Memphis, Tennessee, that is right, is it not?

A. 28. That is right.

X Q. 29. That was a written contract?

A. 29. Yes sir.

X Q. 30. You were the one in charge of negotiating these contracts, I believe you refer to them as "service contracts"?

A. 30. Preliminary negotiations.

X Q. 31. The preliminary negotiations of the contract?

A. 31. Yes sir.

X Q. 32. How you had preliminary negotiation with the Lion Oil Company before it entered into the agreement with Standard Oil Company?

A. 32. Yes sir.

X Q. 33. I wonder if you can tell me, Mr. Bradley, why the Government didn't enter into one of these contracts with the Lion Oil Company and then make some arrangements for the Standard Oil Company to give the servicing.

A. 33. I can't answer why that was handled that way, other than Lion Oil Company could not perform any service. That is the only reason I can give you for it.

X Q. 34. Do you know why the Government didn't lease the tanks and then make a contract with Standard Oil Company?

A. 34. The Air Forces did not lease tanks. The Engineers lease them. We obtain facilities under what we call a "use" contract, or "use" charge.

X Q. 35. The Air Forces do not lease any tanks?

A. 35. The Engineers are delegated to lease the facilities.
[fol. 408] We had the right, from the Engineers, to obtain the facilities under what we call a "use charge". It happened to be the Engineers' responsibility to obtain the facilities for the Government. We had their permission to do so.

X Q. 36. Do you know why the Engineers didn't lease the Lion Oil Company's tanks and the Standard Oil Company's tanks?

A. 36. Yes sir.

X Q. 37. Why?

A. 37. Because they were so short of personnel and we had to move so fast that it takes the Engineers one year to perform the services. We had to have something done quick.

X Q. 38. So, instead of having the Engineers lease them for the Government, you simply made a different type of contract with Standard Oil, is that right?

A. 38. That is right.

X Q. 39. That they would do the storing for a consideration?

A. 39. They would handle oil products for us, that is right.

X Q. 40. Then, the Government didn't have the facilities, didn't have the storage facilities itself, or the Air Corps didn't have the storage facilities for gasoline?

A. 40. That is right.

X Q. 41. And you couldn't lease it, the Government couldn't lease the facilities, because it took too long a period?

A. 41. That is right.

X Q. 42. So then the Government received something of substantial value by virtue of Standard Oil Company of Louisiana having these facilities, didn't they, and leasing [fol. 409] them to the Air Corps?

A. 42. I can't accept that word "lease." I am not allowed to do that.

X Q. 43. All right, sir, and storing the Government's gasoline in those tanks, pursuant to agreement?

A. 43. That is right.

X Q. 44. They received something of value there?

A. 44. Yes sir, they received the use of those facilities which was primarily to aid the distribution of fuel from barges to tank truck, and ultimate delivery to the fields. There were facilities for that kind of movement. It was intransit movement.

X Q. 45. The contract that you had provided for the contractor to do the storing?

A. 45. Yes sir.

X Q. 46. To do the handling in and handling out and storage meanwhile, is that right?

A. 46. That is right.

X Q. 47. That was something the Government could not do, at that time?

A. 47. It didn't have the facilities of their own to do that.

X Q. 48. So that as a practical matter, they couldn't do it?

A. 48. That is right.

[fol. 410] Redirect examination.

By Mr. Green:

R. Q. 1. Mr. Bradley, turn to the first page of Complainant's Exhibit 3 and look at Article I of that contract. I will ask you to read that to yourself, "Article I, Scope of this Contract."

(Witness reads document.)

Will you tell me whether or not the scope of that contract is limited, as cross examination would lead you to believe, to a mere storage?

A. 1. No sir.

R. *D.* 2. What does it provide, in addition to storage?

A. 2. It provides for the receiving, handling, and loading Government owned fuel.

R. Q. 3. What else? I call your attention to three words immediately following the words, "storage" when it first appears, the first three words of the second line of the scope of it? Does it provide for that?

A. 3. I didn't understand the question.

R. Q. 4. I asked you what it provided, and I invited your attention to the first three words in the second line of that paragraph?

A. 4. "And handling facilities".

R. Q. 5. I will ask you than to go to the third from the last line of that paragraph, or the first sentence in that paragraph. Read it aloud for the record.

A. 5. "Service shall be as follows:—"

R. Q. 6. "Said services shall be." what, the next to the last line?

[fol. 411] A. 6. "Said services shall be performed when and as, during the period or periods indicated in said exhibit

"A", the Government shall request and direct the Contractor to supply the same."

R. Q. 7. Turn to Exhibit "A" of that contract. I will ask you if in that exhibit the compensation under that contract and the obligation undertaken by Standard Oil Company under that contract are not there provided?

A. 7. Yes sir.

R. Q. 8. So the Exhibit "A" fixes the compensation?

A. 8. That is right.

R. Q. 9. And the services to be rendered under the contract?

A. 9. Yes sir.

R. Q. 10. On cross examination, Mr. Bradley, you were asked a question whether if when the Government obtained possession of the Lion facilities through the lease to Standard Oil Company, the Government didn't receive valuable services, and your answer was "yes". Is that correct?

A. 10. Yes sir.

R. Q. 11. Mr. Dodson asked you the question, as I understood, if I understood the question correctly, if when the Government obtained the Lion facilities through the medium of a lease from Lion to Standard, and then a change in Standard's contract, the Government did not receive benefits of value, and your reply was, as I understood it, "yes"?

A. 11. Yes, the Government did receive service in the form——

R. Q. 12. I didn't say services, I said, "a thing of value." What I want to know is, did or did not the United States pay [fol. 412] for every benefit it received under that arrangement?

A. 12. Yes sir.

R. Q. 13. Do you know the amounts paid?

A. 13. Not exactly, without refreshing my memory.

R. Q. 14. Will you look that up and refresh your mind on that?

Mr. Cummings: Is this witness undertaking to qualify as an accounting witness?

Mr. Green: There is no accounting problem about that.

A. 14. The Government did fully pay for everything it received, in answer to your question.

Further redirect examination.

By Mr. Waller:

R. Q. 1. You were asked about one of these contracts being dated after the part of the period of the contract expired, was it usual or unusual during the war for Government contracts to be executed late?

A. 1. It was during the shortage of personnel, the majority of the contracts were issued late, due to the volume of them.

R. Q. 2. You referred to these service contracts, Exhibits 1 to 7, as being "boiler plate" contracts. Will you explain a little more why you mean by that?

A. 2. I mean in the first part of the contract, all the way through to Exhibit "A" is a standard form, and Exhibit "A" was added on to bring out the difference we had at each location.

R. Q. 3. Even under Exhibit "A", were all of the services [fol. 413] which might have been called for necessarily performed by the contractor, or even under Exhibit "A", it is provided that those services would be performed when and as directed by the Government? Can you find Exhibit "A" and see?

A. 3. Yes, I have Exhibit "A" here.

R. Q. 4. See what the exact language is.

A. 4. It states on the top part of the Exhibit "A" "The contractor shall perform services when and as, during the period beginning 1 December, 1943, and continuing to and including 30 June 1944, the Government, represented by the Contracting Officer, shall request and direct in storing Government owned aircraft engine fuel——".

R. Q. 5. Which contract are you reading from?

A. 5. Exhibit 3, Exhibit "A" to Exhibit 3.

R. Q. 6. Look at Complainant's Exhibit 1, and look at Page 2 of supplemental agreement No. 1, Paragraph 7. Do you see similar language there, Mr. Bradley?

A. 6. Yes sir.

R. Q. 7. Read that into the record, please?

A. 7. "The services of the types set forth above and at the points and for the unit prices indicated in Exhibit 'A-1', shall be performed when and as, during the period beginning 1 December, 1943, and extending through 30 June, 1944,

the Government shall request and direct the Contractor to supply the same——"

R. Q. 8. That is far enough. Mr. Bradley, in that contract are there certain types of delivery referred to as Type 1, 2 and 3, do you see that?

[fol. 414] A. 8. Yes sir.

R. Q. 9. Do you see where those types of delivery are defined, is that on Page 1, Exhibit "A" still referring to Complainant's Exhibit 1?

A. 9. Yes sir, I see it.

R. Q. 10. Is that the same description, I think one supersedes the other, as found on Page 2 of that supplemental agreement No. 1; is that correct?

A. 10. Yes sir.

R. Q. 11. Read into the record the Type 1, 2 and 3 delivery, as there defined.

A. 11. "Type I, whenever used hereinafter, shall refer to delivery F. O. B. Government storage at destination, in Contractor's transport trucks and/or commercial transport trucks, arranged for by contractor.

"Type II whenever used hereinafter shall refer to delivery F. O. B. commercial transport trucks, or government and/or commercial tank cars at the terminal or bulk plant of the contractor at Memphis, Tennessee. Contractor to arrange for use of truck transports and commercial tank cars when Government cars are not available.

"Type III whenever used hereinafter shall refer to delivery f. o. b. the bulk plant or terminal of the contractor at Memphis, Tennessee, into Government units or such other trucking equipment as may be designated by the Government".

R. Q. 12. Different prices per gallon were designated, were they not, for each type of delivery?

[fol. 415] A. 12. That is right.

R. Q. 13. So far as the actual performance of that contract at Memphis was concerned, do you of your own knowledge know to what extent Type I, II, and III were used, or are you in position to testify about that?

A. 13. I am not, I am sorry.

Recross-examination.

By Mr. Dodson:

R. X Q. 1. Mr. Bradley, were these seven contracts, Complainant's Exhibits 1 through 7, all of the contracts of which you have any knowledge, entered into between the Government and Standard Oil Company in the State of Tennessee?

A. 1. got confused on the first part of your question. May I have it again?

R. X Q. 2. There are seven contracts here that you have referred to?

A. 2. Yes.

R. X Q. 3. Do you know of any other contracts respecting services in Tennessee that were entered into between Standard Oil Company and the Government?

A. 3. Not that I can recall to mind.

R. X Q. 4. Do you know of any instance where services were performed under any of these seven contracts, when storage by Standard Oil Company was not a part of the services actually rendered?

A. 4. No sir.

[fol. 416] Further redirect examination.

By Mr. Green:

R. Q. 1. There is one contract referred to in the complaint, in sub-paragraph A of Section 3, specifically Contract No. W535AC36457, and which is not before you. That is related to the year, 1943. Do you desire to amend your answer made to the last question to that extent?

Mr. Dodson: If I may state into the record, he answered the question the way I asked it. I meant January, 1944 to date.

Further redirect examination.

By Mr. Waller:

R Q. 1. I don't know whether you are familiar with the original, but I will ask you anyway, were you familiar with a contract between the Government and the Standard Oil

Company of Louisiana relating to the pumping of gasoline from barges at Memphis?

A. 1. I know of it.

R. Q. 2. Did that contract relate only to pumping?

A. 2. I believe so.

R. Q. 3. And not to storage?

A. 3. That is right.

R. Q. 4. And that was ancillary to these other contracts, was it not?

A. 4. Yes sir.

R. Q. 5. It was a separate contract?

A. 5. Yes sir.

R. Q. 6. I will show you the document that is marked [fol. 417] Exhibit 26, and see if that will refresh your recollection and if that is the pumping contract that you referred to?

A. 6. Yes, this is what they call a purchase order.

R. Q. 7. A what?

A. 7. A purchase order.

Further this Witness saith not.

C. E. Bradley, by T. Roy Hix, Reporter.

Sworn to before me when taken, the 14th day of April, 1950. T. Roy Hix, Notary Public. My Commission Expires April 6, 1954. (Seal.)

[fol. 418] DEPOSITION OF F. V. THOMPSON

F. V. THOMPSON, the next witness, being first duly sworn, deposed as follows:

Direct examination.

By Mr. Waller:

Q. 1. Mr. Thompson, what is your residence and present occupation?

A. 1. My residence is Washington, D. C. I am a buyer for the Armed Service Petroleum Purchasing Agency, buyer of aviation fuel.

Q. 2. How long have you been connected with the Government in any capacity?

A. 2. Since July, 1941.

Q. 3. In what capacity did you first go with the Government?

A. 3. I went with the Government Air Service Command, Wright Field, Supply Division, Fuels Branch, in the capacity of Supply Officer.

Q. 4. Was there any change in your position thereafter?

A. 4. I held various positions, all in the same office, during the period from July, 1941 to February 1946.

Q. 5. What, in general, were your duties and responsibilities?

A. 5. My duties were in connection with supply of aviation fuel to Air Force activities, in a supervisory capacity; and I coordinated with allocation, distribution and transportation, with special emphasis on initiating the contracts that were necessary for proper distribution of fuel.

[fol. 419] Q. 6. Did you have any duties in connection with administering the contracts which have been filed in this case as Complainant's Exhibits 1 to 7, inclusive?

A. 6. Yes sir, I initiated the procurement thereon. That is, I requested the services be put under contract to the contracting officers.

Q. 7. Then you were fully familiar with those contracts and with the administration of them?

A. Yes sir.

Q. 8. I will ask you if you will examine those exhibits, Complainant's Exhibits 1 to 7 inclusive, and state if they are the service contracts relating to the Memphis Terminal and the Knoxville Terminal which the Government had with the Standard Oil Company of Louisiana, commencing with January, 1944?

A. Yes sir, they are the contracts.

A. 9. I believe Complainant's Exhibit 1 is related to storage, handling and loading of Government owned gasoline at Memphis?

A. Yes sir.

Q. 10. For the period January 1, 1944 through June 30, 1944?

A. Right.

Q. 11. Exhibit 2, I believe covers the same period, and is related to the Lion Tanks, also at Memphis?

A. That is right.

Q. 12. Now, that actually started January 9, 1944, did it not?

A. That is right.

[fol. 420] Q. 13. Exhibit 3 is related to Knoxville and Kingsport for the period January 1, 1944 through June 30, 1944, is it not?

A. That is right. Johnson City, I believe that is the one.

Q. 14. Exhibit 4 covers the Memphis operation, including the Lion tanks for the period July 1, 1944 through June 30, 1945?

A. Exhibit 4?

Q. 15. That is right.

A. Yes sir.

Q. 16. Exhibit 5 relates to Knoxville, does it not, for the period, July 1, 1944 through June 30, 1945?

A. That is right.

Q. 17. Exhibit 6 is the same as Exhibit 4, is it not, except it was for the period, July 1, 1945, through June 30, 1946, that is to say, related to the operations at Memphis, including the Lion tanks?

A. That is right.

Q. 18. And Exhibit 7 covers Knoxville from July 1, 1945 through June 30, 1946?

A. And extended through 28 November, 1946.

Q. 19. What was the procedure pursuant to which Government owned gasoline was shipped to and received at Memphis under those contracts relating to Memphis?

A. Grade 100 was purchased from the Defense Supplies Corporation, exrefineries designated by PAW in their allocations. Grade 91 and grade 87 were purchased under [fol. 421] supply contracts, also f. o. b. refinery, from various suppliers, who PAW also designated. The Government either picked up the gasoline at the refinery in their own equipment, or equipment arranged for by the Government, either moved it directly to using activities by rail or moved it through various water terminals with stopovers in transit, to destinations at the terminals, and reloaded at the terminal to equipment which could take it to using activities.

Q. 20. How was the transportation arranged by which the gasoline was transported to the Memphis Terminal?

A. The Transportation Section of the Air Forces were responsible for arranging for all transportation. They coordinated with them in the Supply Division, with O. D. T. and others in the moves that we set forth. The distribution people were responsible only for designating the shipping point. The transportation people furnished bills of lading, designated carriers, and so forth.

Q. 21. Was the aviation gasoline handled at Memphis pursuant to these contracts relating to Memphis, which you have already mentioned?

A. Yes sir.

Q. 22. Wait, I had not finished. What were the sources of that gasoline as to whether or not it was produced by the Standard Oil Company of Louisiana or by it and others?

A. PAW allocated a total quantity of gasoline for use by the Air Forces each month. APPAC and PAW assigned refineries with sufficient capacity to cover the total allocation given to the Air Force. These allocations or [fol. 422] refinery assignments, were from practically all refineries capable of producing high octane gasoline, and it varied from month to month.

Q. 23. There is an exhibit to the bill of complaint in this case marked Exhibit "A", which indicates that on January 6, 1944 there was received at Memphis from Baton Rouge, Louisiana, a quantity of Grade 91 gasoline in Barge DPC-113-UBL. I would like for you to examine Complainant's Exhibits 12, 14, and 15, and state whether or not that barge load of gasoline was transported to and received at Memphis in conformity with the requirements of the service contract then in effect, and explain your answer with reference to those exhibits. Tell what each of the exhibits is, Mr. Thompson, and explain them.

A. Exhibit 12 is a supply contract with the Standard Oil Company of Louisiana, covering deliveries beginning 1 October, 1943 and ending June 30, 1944.

Q. 24. You say, "supply contract", will you distinguish between what you mean by "supply contract" and a "service contract" of the type you have already referred to?

A. Grades 87 and 91/98 aviation fuel were never included in the 4-Party-Agreement, as purchased by the Defense Supplies Corporation. The contracts covering the purchase of the product, f. o. b. refinery designated by PAW, were

entered into between the Air Force and the contractor who produced the fuel.

Q. 25. Was this Complainant's Exhibit 12 such a contract?

A. Yes sr.

[fol. 423] Q. 26. Covering the production of those grades of gasoline or what grades of gasoline?

A. This contract covers delivery to the Air Forces of Grade 91.

Q. 27. Then was it under this contract that the Government purchased from the Standard Oil Company of Louisiana at the refinery this grade of gasoline?

A. Yes, provided an allocation was made for the month in question.

Q. 28. Now, refer to Complainant's Exhibit 14 and also to Complainant's Exhibit 15, and state whether or not those documents were documents executed in conformity with the system that had been arranged?

A. Well, Exhibit 14 appears to be an invoice by Standard Oil Company of Louisiana to the Air Forces, covering lifting of Barge DPC-113 from Standard Oil Company of Louisiana, Baton Rouge, Louisiana, consigned to Transportation Officer care of Standard Oil Company of Louisiana. The Exhibit 15——

Mr. Dodson: There is a part in there I didn't get on Exhibit 14, I would like to get it.

(The previous answer was read.)

By Mr. Waller:

Q. 29. Are you looking at the invoice now?

A. Yes sir, I am looking at the invoice. (Exhibit 14.) Contract ac-1018. The date this voucher was shipped was December 21, 1943.

Q. 30. Who was it consigned to?

[fol. 424] A. Consigned to U. S. Army, care of Standard Oil Company of Louisiana, Memphis, Tennessee.

Q. 31. F. O. B. where?

A. F. O. B. refinery. The quantity was 252,766 gallons, 60 degrees temperature.

Q. 32. I think you referred to the bill of lading and

stated that the consignee was the Transportation Officer at Memphis?

A. That is right.

Q. 33. Is the U. S. Army and the Transportation Officer one and the same?

A. The Transportation Officer is a representative of the U. S. Army at Memphis in matters of transportation.

A. 34. Does that bill of lading and that invoice relate to the same shipment?

A. This Exhibit 15 is a copy of a bill of lading covering a shipment from Baton Rouge to the Memphis Terminal, consigned to Transportation Officer, Standard Oil Company of Louisiana, Memphis, Tennessee, against Supply Contract ac-1018. The product apparently was picked up by the Federal Barge Line, Barge DPC-113, UBL.

Q. 35. Mr. Thompson, is that Contract 1018 to which you have referred, the contract marked Complainant's Exhibit 12?

A. That is right.

Q. 36. So both the invoice, Complainant's Exhibit 14, and the bill of lading, Complainant's Exhibit 15, referred to the supply contract, Complainant's Exhibit 12, which is Contract No. 1018; is that correct?

[fol. 425] A. That is correct. Further, the price extended in the price column of the invoice relates to Item 1-B, which is, "F. O. B. commercial and/or Government tank cars, tankers or barges at contractor's refinery, Baton Rouge, Louisiana, at the unit price of $0.0900 per gallon." That is Article 15 of the Contract, Item 1-B.

Q. 37. Then from your examination of those documents, Mr. Thompson, can you state whether or not this barge load of gasoline was purchased by the Army Air Forces pursuant to this supply contract, Complainant's Exhibit 12, and shipped to the Government at Memphis to be received there and handled pursuant to the service contract?

A. These documents indicate that it was. That was the usual procedure for handling Grade 91 or other grades of aviation fuel during this period.

Q. 38. Mr. Thompson, can you state where the Government took title to this gasoline, and refer, if you will, to any portions of the supply contract, Complainant's Exhibit 12, which will substantiate your answer.

Mr. Cummings: For the record, and not to be antagonistic, we want to note an objection to that, on the ground that it calls for a legal conclusion on the part of the witness, in the first place; and in the second place, it is subject to the Exhibit No. 12.

Mr. Waller: This is just for clarification.

A. The contract itself indicates that it was f. o. b. the shipping point at which the Government accepted the material, when it became the property of the Government.

[fol. 426] Item 1-b, Article 15, Page 7 of the contract.

Q. 39. Refer to Article 17, if you will.

Mr. Dodson: Unless he knows of his own knowledge actually when it was done, we want the record to show again an objection, on the ground that the contract is the best evidence and the construction of the contract is for the Court.

The Witness: The product was inspected at the refinery before shipment was made, and accepted when the product was loaded into the barge.

By Mr. Waller:

Q. 40. Inspected by whom?

A. Inspected by the Air Force Inspector, located at Baton Rouge.

Q. 41. According to Exhibit "A" to the bill of complaint, the next barge load of Government owned gasoline received at the Memphis Terminal in the month of January, 1944, was Barge ROR-103, received at Memphis January 11, 1944. Will you refer to Complainant's Exhibit 16 and state whether or not you can give us the same information, or some of the information regarding that shipment, as you did regarding the first shipment?

A. This is a copy of the bill of lading covering a lifting of Barge ROR 103, received at Memphis January 11, 1944. Will you refer to Complainant's Exhibit 16 and state whether or not you can give us the same information, or some of the information regarding that shipment, as you did regarding the first shipment?

[fol. 427] A. This is a copy of the bill of lading covering a lifting of Barge ROR-103, Grade 87 fuel, from Cities

Service Oil Company, St. Rose, Louisiana, and consigned to Army Air Forces, Republic Oil Company Terminal, Greenville, Mississippi. There is a letter of transmittal which indicates that this bill of lading was sent to Standard Oil Company of Louisiana, at Memphis, with the information that this barge was originally consigned to Greenville, Mississippi, but diverted to Memphis by Government order while en route.

Q. 42. Did those diversions frequently take place, Mr. Thompson?

A. Yes, there were a number of occasions when it was necessary to divert barges while en route.

Q. 43. What was the reason for that?

A. Various reasons, lack of ullage or lack of space in there to receive it; increased activity at some point near a terminal other than where the shipment was intended to go, or various other reasons.

Q. 44. Who controlled such diversions?

A. The diversion itself was ordered by the Transportation Officer, at the request of the Fuel People, which I was representing.

Q. 45. You mean of the Army Air Forces?

A. Of the Army Air Forces.

Q. 46. What was at St. Rose?

A. The Air Force entered into a contract with Cities Service Oil Company for services in connection with receiv-[fol. 428] ing, storing and handling of Government owned fuel, in order that balances of all allocations that had been given to the Air Force could be picked up and accumulated for barge or tanker shipment, and for distribution directly from St. Rose Terminal by tank car or truck.

Q. 47. Was there a refinery at St. Rose?

A. Not to my knowledge. We were never allocated fuel at St. Rose.

Q. 48. Was that a storage depot for the Army Air Forces, or what would you call it?

A. The Air Forces used the St. Rose Terminal as a stop-over for products that were picked up on the Gulf and taken over to the river through the intercoastal canals. Different barges were used for river traffic than were used through the intercostal canals.

Q. 49. So the purpose of it was to provide a conduit from one type of transportation to another type.

A. And to accumulate stocks for larger liftings.

Q. 50. And the gasoline that was transshipped at St. Rose might have come from different refineries?

A. That is true.

Q. 51. Does this bill of lading show the grade of that gasoline?

A. This is Grade 87.

Q. 52. Did the Air Force procure any Grade 87 aviation gasoline from the Standard Oil Company of Louisiana, refinery at Baton Rouge? Or do you know?

A. I don't know, without consulting the records.

[fol. 429] Q. 53. The next shipment shown on Exhibit "A" to the bill of complaint seems to have come in Barge DPC-425X and was received on January 15, 1944. I will ask you to refer to Complainant's Exhibit 17, and see if you can, from that, give similar information to that you have given with respect to the earlier barging?

A. This was a barge shipment originating at Baton Rouge, Louisiana, picked up by the Mississippi Valley Barge Lines, consigned to Transportation Officer, care Standard Oil Company of Louisiana, Memphis.

Q. 54. What grade of gasoline?

A. This was Grade 100/130 as indicated by the Contract No. ac-37,000.

Q. 55. Is that the 4-Party-Agreement relating to 100 octane gasoline and above?

A. That is right.

Q. 56 Which is Complainant's Exhibit 9?

A. That is right.

Q. 57. How did the title to that pass to the Government?

Mr. Cummings: For the record, the same objection.

By Mr. Waller:

Q. 58. Refer to Complainant's Exhibit 8, if you like.

A. The title passed from the manufacturer at refinery, to the Defense Supplies Corporation on the signature on the Form 50, it is signed by L. T. Carson, for Defense Supply Corporation and to the Air Force by signature of the

same man, who was the Army Air Forces Inspector at Baton Rouge.

[fol. 430] Q. 59. That Form 50 that you have referred to is a part of Complainant's Exhibit 8, attached to the exhibit, is it not, as a part of it?

A. That is right.

Q. 60. That particular receipt, Mr. Thompson, is dated January 4, 1944, is it not?

A. That is right.

Q. 61. Does the receipt show the barge number, No. DPC-425-X?

A. That is right. It corresponds with the barge number on the memorandum copy of the bill of lading.

Q. 62. You are now referring to Complainant's Exhibit 17?

A. Right.

Q. 63. The next barge as shown on Exhibit A of the bill of complaint is Barge LTC-24, received January 22, 1944. Would you refer to Complainant's Exhibits 18, 19 and 20 in connection with that shipment, Mr. Thompson, and give us similar information to that you have given with respect to the prior shipments, stating the source and how title passed.

Mr. Dodson: Let the record show the same objection insofar as the question contains the words, "And how title passed."

A. Exhibit 18 is a Supply Contract between the Air Forces and the Gulf Oil Corporation, covering delivery of Grades 91, and 87, f. o. b. contractor's refinery at Port Arthur, Texas.

[fol. 431] By Mr. Waller:

Q. 64. Before you lease that exhibit, Complainant's Exhibit 18, what was the period covered by that supply contract with the Gulf Oil Corporation?

A. The period was 1 October, 1943, through 30 June, 1944.

Q. 65. Then will you refer to the invoice, Complainant's Exhibit 19 and the memorandum bill of lading, Complainant's Exhibit 20, and state whether or not those documents were executed in conformity with the system you have described?

A. Exhibit 19 appears to be an invoice from Gulf Oil Corporation for aviation gasoline, Grade 87, lifted by barge, Barge No. LTC-24. It is hard to read this photostatic copy.

Q. 66. Is the contract number referred to?

A. Contract number referred to is ac-1008.

Q. 67. And is that Complainant's Exhibit 18?

A. That is Contract AC-1008, Exhibit 18.

Q. 68. Are you now referring to Complainant's Exhibit 20?

A. Complainant's Exhibit 20 is a memorandum copy of a bill of lading covering the lifting of Grade 87 gasoline from Port Arthur, Texas, and consigned to Standard Oil Company of Louisiana, Memphis, Tennessee. The gallonage shown is the same in both documents.

Q. 69. Does that show Barge LTC-24?

A. Barge LTC-24.

Q. 70. All of these bills of lading are Government Bills of Lading, are they not?

A. Yes sir.

Q. 71. What do you mean by "Government bills of lading"?

[fol. 432] A. A Government bill of lading is a document tendered to the carrier for signature on lifting, which gives evidence to the Government that he has accepted the shipment from or at the point indicated. The document is executed by him and receipted for at destination. The carrier gets paid on that offering of the executed document to the proper finance officer.

Q. 72. Who paid for the transportation pursuant to these Government bills of lading?

A. The Transportation Division, Washington, D. C., War Department, Transportation Division.

Mr. Cummings: Which exhibit are you referring to, Mr. Thompson?

The Witness: Exhibit 20.

By Mr. Waller:

Q. 73. The next barge of the Government gasoline was received at Memphis, according to Exhibit A to the bill of complainant, was DPC 494 X received on January 22, 1944.

I will ask you to refer to Complainant's Exhibits 21, and 22, as well as to the Supply Contract, Exhibit 18, and state the source of that bargeload of gasoline, how title passed, and the other information you have given with respect to the former shipments?

A. Exhibit 21 appears to be a copy of Gulf Oil Corporation invoice to the Air Force for delivery of Barge DPC #494, of 399,394 gallons of Grade 91 aviation gasoline, charged against Contract AC-1008, f. o. b. Port Arthur, Texas. January 7, 1944, is the date of the invoice. Exhibit 18 provides for such delivery, under Article 15, Item [fol. 433] 1-b. Exhibit 22 is a memorandum copy of a bill of lading covering shipment from Port Arthur, Texas to Standard Oil Company of Louisiana, Memphis, Tennessee, of Grade 91 aircraft engine fuel, 399,394:38 gallons. Barge DPC 494 X.

Q. 74. Where did the Government take title to that gasoline?

Mr. Dodson: Same objection.

A. At the refinery.

By Mr. Waller:

Q. 75. Where was the Gulf refinery?

A. Port Arthur, Texas.

Q. 76. The next bargeload of gasoline which appears on Exhibit A to the bill of complaint, is DPC-424X received at Memphis, January 23, 1944. Will you refer to Complainant's Exhibit 23 and 24, and explain that shipment?

A. Exhibit 23 appears to be a copy of an invoice on Air Forces, Gulf Oil Corporation, covering delivery into Barge DPC-424 X, f. o. b. Port Arthur, Texas, lifted on the 7th of January, against Contract AC 1008.

Q. 77. That again is Complainant's Exhibit 18, is it not?

A. That is right. Exhibit 24 is a memorandum copy of Government bill of lading covering shipment from Port Arthur, Texas, to Standard Oil Company of Louisiana, Memphis, Tennessee, of aviation gasoline, Grade 91, in Barge DPC 424 X. Date of shipment, January 7, 1944.

Q. 78. Is that the same gasoline referred to in the invoice?

A. That is correct.

[fol. 434] Q. 79. And where did the Government take title to that gasoline?

Mr. Dodson: Same objection.

A. F. o. b. barge, Gulf, Port Arthur, Texas.

By Mr. Waller:

Q. 80. The next barge of gasoline received at Memphis, according to Exhibit A to the original bill of complaint, was Barge DPC 409 X received January 28, 1944. Can you refer to Complainant's Exhibit 25, and explain that shipment?

A. Exhibit 25 is a memorandum copy of U. S. Government bill of lading, covering shipment from Phillips Petroleum Company, East St. Louis, Illinois, and consigned to the Transportation Officer, care Standard Oil Company of Kentucky, Louisville, Kentucky. Mississippi Valley Barge Line. This is Grade 100/130 aviation gasoline, with a notation. "This shipment diverted to Standard Oil Company of Louisiana, Memphis Tennessee. On this bill of lading. No other bill of lading issued for any portion of this movement. Additional transportation costs, if any, including those for diversion, chargeable to Procurement Authority cited herein." Signed, "A. B. Anderson, 1st Lt. A. C."

Q. 81. Will you explain it?

A. The product was allocated to the Air Forces f. o. b. Borger, Texas. The Air Forces did not have sufficient requirements in the shipping area from Borger, Texas, to absorb all of the material allocated at that point. Therefore, the Air Forces entered into a contract with Phillips [fol. 435] Petroleum Company to transport this product through Phillips Petroleum Company's pipelines into storage at East St. Louis, and barges furnished by the Government from that storage. The material itself was chargeable to Contract AC-37000.

Q. 82. That is the 4-Party-Agreement, Exhibit 9 to the Complaint?

A. That is right. This barge was DPC 409 X, received 23 January, 1944.

Q. 83. Is that the 28th instead of the 23rd?

A. It looks like the 23rd.

Q. 84. That is a figure that might be a 3 or an 8, is that correct?

A. That is correct.

Q. 85. You are referring to the figure at the bottom of Complainant's Exhibit 25?

A. Yes sir.

Q. 86. At the top of the bill of lading there is a date, 1 February 1944. Can you explain that date on that bill of lading?

A. Evidently the original bill of lading was cancelled and this bill of lading substituted to cover the diversion charges and additional costs.

Q. 87. Where there is a diversion, what is the procedure with reference to the bill of lading?

A. The Transportation Officer certifies that the barge was diverted and that any additional costs are chargeable to the Procurement Authority, the number on the bill.

[fol. 436] Q. 88. The new bill of lading follows the shipment instead of going with the shipment?

A. That is correct.

Mr. Cummings: I move to exclude this exhibit, on the ground that it contains a discrepancy on its face, which is not explained. It contains a statement that no bill was issued in transit. Let that go in the record.

Mr. Green: On behalf of the Intervenor, attention is invited to the statement on the face of the bill of lading, "No other bill of lading issued for any portion of this movement. Additional transportation costs, if any including those for diversion, chargeable to Procurement Authority cited herein." That indicates within itself that there was previously a bill of lading issued and there is no discrepancy in the bill of lading.

Mr. Cummings: Our position is that there was not.

Mr. Green: That is put in there to warn so that the other bill of lading wouldn't be paid by the Procurement Officer and kill the other bill of lading.

By Mr. Waller:

Q. 89. Do you have any other explanation of this bill of lading?

A. No sir.

Q. 90. You heard Mr. Green's statement about the bill of lading, was that correct, or not?

Mr. Dodson: We object to that, the form of the question.
Mr. Cummings: We want a ruling on that, Mr. Reporter.

[fol. 437] By Mr. Waller:

Q. 91. What is the conventional practice on a diversion?
A. I don't know.
Q. 92. Mr. Thompson, you stated that you were familiar with these contracts, Complainant's Exhibits 1 through 7, inclusive, that we have called "Service contracts", I believe?
A. Yes sir.
Q. 93. Will you look at the Complainant's Exhibit 1, Article 1, relating to the scope of the contract?
A. Yes sir.
Q. 94. Is the body of this contract, including Article 1, a form that was used in a great many Government contracts?
A. Yes sir.
Q. 95. With different contractors?
A. Yes sir.
Q. 96. I notice that services are to be performed when and as the Government shall request and direct the contractors to supply the same, and the question I want to ask you is whether or not, referring to Sub-Paragraph (1) at the top of Page 2, I want to ask you whether or not the contracting officer, that is to say, the Government, ever directed the Standard Oil Company of Louisiana, under this contract or these other contracts relating to the Memphis Terminal, to order stocks of fuel to be shipped to contractor's storage facilities?
A. Under the Memphis Contract, the Contracting Officer did not order Standard Oil Company to order products into the storage.
[fol. 438] Q. 97. Who did order the stock of fuels to be shipped to these storage facilities?
A. The scheduling of barges was handled by a department under my supervision, who watched inventory reports and requirements and released, coordinated with the Transportation Section to get movements into terminals where we needed additional stock. These people nominated barge liftings from suppliers and the Traffic Section provided bills

of lading and made arrangements with barge companies to move the product.

Q. 98. I notice some of these barges have the d-signations, "DPC". What does that mean?

A. That designates "Defense Plant Corporation", Government owned equipment.

Q. 99. What does "LTC" mean?

A. I don't know that designation.

Q. 100. Do you know what "ROR" means?

A. I have no definite knowledge of that.

Q. 101. Did you receive reports from the Standard Oil Company of Louisiana as to the stock on hand from day to day, the shipments made out of it from day to day and that kind of information?

A. Reports were received in my office through a reporting system that was used during the war. Standard Oil Company of Louisiana reported to agencies of the Government directly, other than to us and these reports were complied and sent in daily to us, so that we knew the inventory position daily.

[fol. 439] Cross-examination.

By Mr. Dodson:

X Q. 1. Mr. Thompson, you have referred here to several exhibits. I have them, sometimes by the number of the Government bill of lading, and other times by the invoice number, but in any event, the shipments that you have referred to from Exhibits 14, 16, 17, 19, 21, 23, and 25, please look to those exhibits and tell me how the gasoline moved in each instance, that is, by what facility? What was the first one?

A. Was that 14?

X Q. 2. 14 as I remember.

A. On Exhibit 14——

X Q. 3. Which you may consider together with Exhibit 15. They went together?

A. That is right. They cover shipment in Barge DPC-113 from Baton Rouge, Louisiana, to Memphis, Tennessee.

X Q. 4. What transportation company?

A. Federal Barge Line, as indicated.

X Q. 5. Do you know who owns Federal Barge Line?

A. No sir.

X Q. 6. Going back next to No. 16, Exhibit 16, if you will just in each instance give me the company?

A. The company was Cities Service Oil Company——

X Q. 7. No, I am talking about the transportation company, who actually did the transporting?

A. Husky Transit Corporation.

X Q. 8. Do you know who owns the Husky Transit Corporation?

A. No sir.

[fol. 440] X Q. 9. All right, sir, next go to No. 17.

A. Mississippi Valley Barge Line, as indicated.

X Q. 10. Do you know who owns that?

A. No sir.

X Q. 11. All right, look at Nos. 19 and 20. I believe they go together, do they not?

A. Yes sir.

X Q. 12. What is that one?

A. Terry Dalehite Company.

X Q. 13. Do you know who owns the Terry Dalehite Company?

A. No sir.

X Q. 14. Take Nos. 21 and 22 together, that is Terry Dalehite Company, is it not?

A. Yes sir.

X Q. 15. Take 23 and 24, they reflect the same, do they not?

A. Yes sir.

X Q. 16. Exhibits 23 and 24?

A. Yes sir, that is right.

X Q. 17. That is against the Terry Dalehite Company?

A. Yes sir.

X Q. 18. That is a transporting company?

A. Yes sir.

X Q. 19. Exhibit 25?

A. Mississippi Valley Barge Line.

X Q. 20. You have already testified you didn't know anything about the ownership of that company?

A. That is right.

[fol. 441] X Q. 21. The gasoline shipments that are covered by each of these exhibits that I have just gone over with you, in each instance that gasoline was stored in Memphis, is that correct?

A. It was delivered to Memphis.

X Q. 22. When it was delivered to Memphis, what happened to it?

A. It was unloaded and transshipped by truck and tank car.

X Q. 23. When it was unloaded, what happened to it? Where was it put?

A. It came to us through tanks that were provided, storage tanks that were provided for in the service contract.

X Q. 24. And the service contract that you refer to is Complainant's Exhibit No. 1, together with Complainant's Exhibit No. 2?

A. Yes, that is right.

X Q. 25. It was placed in those tanks belonging to the Standard Oil Company of Louisiana?

A. That is correct.

X Q. 26. Or leased by them from Lion Oil Company, in accordance with the contract which was exhibited here, Complainant's Exhibit No. 34?

A. That is correct.

X Q. 27. And kept in those tanks until it was subsequently placed in some other means of conveyance for delivery?

A. That is correct.

X Q. 28. Refer back, if you will please sir, to Exhibit 16. Do you know of your own knowledge who refined that [fol. 442] gasoline?

A. No sir.

X Q. 29. Can you look to that Exhibit No. 16, and tell who refined the gasoline?

A. No sir.

X Q. 30. Look to Exhibits 17 and 25, with the same question in mind, please sir.

A. Exhibit 25, Phillips Petroleum Company, Borger, Texas.

X Q. 31. Does Exhibit 25 show it?

A. No sir.

X Q. 32. Exhibit 17?

A. This was refined——

X Q. 33. Wait a minute—go ahead.

A. Refined at Baton Rouge, Louisiana, Standard Oil Company of Louisiana.

X Q. 34. Looking again to Exhibit 25, that shows, I believe does it not, that the gasoline had been shipped from some point to Phillips Petroleum Company at East St. Louis?

A. Yes sir.

X Q. 35. And there stored?

A. Yes sir.

X Q. 36. And then shipped from that point, destined for Louisville?

A. Yes sir.

X Q. 37. And then a change in the shipment while it is in trans., and it is diverted to Memphis, Tennessee?

A. Yes sir.

[fol. 443] X Q. 38. And there stored?

A. Yes sir.

X Q. 39. Do you have before you the Exhibit A to the original bill?

A. Yes sir.

X Q. 40. That is the exhibit from which Mr. Waller examined you on direct examination with respect to the date of these shipments, he referred back to that, if you recall?

A. Yes sir.

X Q. 41. Just for the record, will you explain it or will you correlate the gasoline gallonage as shown on Exhibit 14, 16, and 17, the same ones I asked you about before, 19, 21, 23, and 25, and the gallonage shown on Exhibit A to the original bill? Let's start off with No. 14, and I can show you what I mean. Exhibits 14 and 15 were taken together. That is the shipment, as I understand it, that you testified was shown on Exhibit A as, "Barge DPC 113 UBL, January 6, shown on Exhibit A as going into tank Nos. 7 and 8, being Grade 91 gasoline.

A. There was a conversion necessary here, and the bill of lading——

X Q. 42. Look to the invoice first. What gallonage does it show?

A. The gallonage appears to be 252,766 gallons. These two figures here show total 250,389, against the invoice 252,766.

X Q. 43. Why the disproportion, that was the question

I asked. That same disproportion exists in all of these [fol. 444] others, and I was wondering why the disproportion?

A. That is evaporation losses, temperature corrections that may vary, but in any event there should be losses, line losses in unloading and loading.

X Q. 44. The same disproportion would hold true in all of the rest of these, would it not?

A. It is probable.

X Q. 45. I don't mean the same percentage, but some disproportion?

A. It is probable that there would be.

X Q. 46. And the same explanation would hold true in each instance?

A. Yes sir.

X Q. 47. Mr. Waller asked you awhile ago when and where the gasoline was inspected in each instance. Did you make that inspection?

A. No sir.

X Q. 48. Were you present when that inspection was made?

A. No sir.

X Q. 49. Then you don't know of your own knowledge when and where it was made, do you?

A. The contract provides that it will be made——

X Q. 50. You don't know of your own knowledge where and when it was made? You know where it was made and when it was made if the contract was followed out?

A. That is correct.

X Q. 51. But you don't know of your own knowledge whether or not the contract was followed out in each instance, do you?

[fol. 445] A. No sir.

X Q. 52. When you procured transportation facilities, did you have service contracts with them?

A. There was some transportation covered by service contracts.

X Q. 53. What about the transportation in each of these instances, do you know whether or not it was covered by service contracts?

A. One contract covered transportation, Exhibit No. 1, covered transportation services.

X Q. 54. You mean Complainant's Exhibit 1 covered the transportation of gasoline?

A. Yes sir.

X Q. 55. Exhibit No. 1 was a contract entered into between the Government and Standard Oil Company of Louisiana, was it not?

A. Yes sir.

X Q. 56. So the Government entered into a contract with respect to this gasoline we are talking about with Standard Oil Company that they were to handle the transportation, "they" being Standard Oil Company, is that correct?

A. If directed by the Contracting Officer.

X Q. 57. You have referred to several shipments of gasoline here, were there contracts in each of those instances with the Company which transported the gasoline, between the Federal Government and that particular company?

A. The bill of lading is the contract.

X Q. 58. That is the only contract?

[fol. 446] A. I don't know.

X Q. 59. Then you don't know whether or not there were service contracts entered into between the Federal Government and these companies which actually handled the shipping in each of these instances that you have referred to?

A. No sir.

X Q. 60. Of your own knowledge, you don't know whether or not this gasoline was actually received at the Memphis Terminal, do you?

A. No sir.

X Q. 61. Can you look to those contracts or those bills of lading or invoices, or whatever they be in each instance, that we have already referred to by exhibit number, and tell whether or not the gasoline was actually received at the Memphis Terminal?

A. The Property Accountable Officer there, who certified receipts, accepted supporting documents similar to these as proof of delivery.

X Q. 62. That has not been exhibited, has it?

A. No sir.

X Q. 63. Then my question is, can you look to the exhibits

that we have here and tell whether or not the gasoline was actually received at Memphis?

A. These exhibits were accepted by the Property Accountable Officer, as proof of delivery.

Further cross examination.

By Mr. Cummings:

X Q. 1. Do the bill of lading exhibits which you have [fol. 447] identified in your testimony purport on their face to show receipts by the consignee at the Memphis Terminal?

A. These are memorandum copies.

X Q. 2. Eight copies of the original issue of the bill of lading, isn't that correct?

A. That is right.

X Q. 3. Do they purport to show on their face that the shipments were received at the Memphis Terminal by the consignee?

Mr. Waller: May I state, Mr. Cummings, that these are the copies that were retained at the Terminal, and Mr. Sleeker, who will be one of our witnesses, will identify these particular copies of the Government bills of lading. Of course they are made out in a great many duplicates.

Mr. Cummings: I think eight were all the copies that were made out.

The witness: These copies are not all completely executed.

By Mr. Cummings:

X Q. 4. These copies, then are not the copies upon which the Government paid the transportation charges?

A. No sir.

X Q. 5. They don't purport on their face to be complete?

A. That is right.

[fol. 448] Redirect examination.

By Mr. Waller:

R. Q. 1. Mr. Thompson, you were asked about the ownership of the Federal Barge Line, Husky Transit Corporation, Mississippi Valley Barge Line, and the Terry Dale-

hite Company. You stated you didn't know the ownership, do you know whether or not they were common carriers?

A. No sir.

R. Q. 2. You were asked whether or not this Government-owned gasoline was stored at these tanks at Memphis. I believe you said it was. I want to ask you this question, as to whether the purpose of the Government was to utilize these tanks for storing reserve aviation gasoline, that is, for storage purposes, as distinguished from transshipment purposes, what was the real purpose?

A. The purpose was to trans-ship. Storage was only incidental to receiving in quantities such as our receipts from barges.

R. Q. 3. Trans-shipment, that is exchanging from water transportation to land transportation?

A. That is correct.

R. Q. 4. And it was absolutely necessary to do that and put the gasoline in tanks?

A. Yes sir.

R. Q. 5. And store in tanks?

A. Yes sir.

R. Q. 6. You were asked whether or not you personally knew that the Army Inspectors at the refineries inspected [fol. 449] the gasoline when it was shipped by barge. Did Wright Field receive inspection reports?

A. Yes sir.

R. Q. 7. Do you know whether inspection reports were received with respect to these shipments that you testified about, or do you know simply that that was the routine?

A. That was routine, provided for in the contract.

R. Q. 8. I believe you stated that Complainant's Exhibit 1 provided for transportation, if directed by the Contracting Officer?

A. Yes sir.

R. Q. 9. Did the Contracting Officer direct the Standard Oil Company of Louisiana to provide transportation with respect to any of these shipments that you have testified about, in January, 1944?

A. No sir.

Recross-examination.

By Mr. Dodson:

R. X Q. 1. Exhibit 1, Complainant's Exhibit 1, as these other exhibits of service contracts, refers to the "Contracting Officer"; you were not the Contracting Officer, were you?

A. No sir.

R. X Q. 2. Was the Contracting Officer under your supervision and control?

A. No sir.

R. X Q. 3. Then you don't know of your knowledge [fol. 450] whether or not the Contracting Officer ordered any stocks of fuel to be shipped by Standard Oil Company?

A. Contracting Officers acted at the request originating from my office. We never requested him to direct this action.

R. X Q. 4. You mean that was the procedure that was normally followed, do you not?

A. Yes sir.

Further redirect examination.

By Mr. Waller:

F. R. Q. 1. Mr. Thompson, what is the function of a Contracting Officer, in Government parlance?

A. The Contracting Officer either negotiates or formally advertises for services and supplies, as requested by the people that are responsible for the supplies. He executes contracts for the Government.

F. R. Q. 2. Is the duty of the Contracting Officer, with respect to signing contracts and other documents, mainly a ministerial duty, or is he the man that determines the policy and that sort of thing?

A. The Contracting Officer acts on an authorized request from, in the case of Wright Field, the Supply Division, for supplies or services. He may delegate his authority to others, administratively.

F. R. Q. 3. Then if there had been a request for a particular type of service under this service contract, such as transportation service, who would have initiated the request?

[fol. 451] A. My office.

F. R. Q. 4. And did you initiate such request?

A. No sir.

F. R. Q. 5. That is, with respect to the transportation matter that Mr. Dodson asked you about, you understood that is what I meant?

A. Yes sir.

Further recross-examination.

By Mr. Dodson:

F. R. X Q. 1. Mr. Thompson, when your office initiated a request, what was the request?

A. When we initated a request, we requested a contract to cover ~~receiving~~, storage, handling, and delivery of Government owned aircraft engine fuel through Memphis to points where the product would be consumed.

F. R. X Q. 2. Your office then didn't designate who was actually to do the transporting, did it?

A. No sir.

F. R. X Q. 3. And who actually designated who was to do the transporting?

A. The Transportation Section.

F. R. X Q. 4. That was not under your supervision?

A. That is right.

Further this Deponent saith not.

F. V. Thompson, by T. Roy Hix, Reporter.

Sworn to before me when taken, the 14th day of April, 1950. T. Roy Hix, Notary Public, State at Large. My Commision Expires April 6, 1954. (Seal.)

[fol. 452] DEPOSITION OF A. W. GOLDSCHMID

A. W. GOLDSCHMID, the next witness, being first duly sworn, deposed as follows:

Direct examination.

By Mr. Waller:

Q. 1. Mr. Goldschmid, where do you live, and what is your occupation?

A. I live at Jackson, Tennessee, and I am now in the Sales Force for Esso Standard Oil Company.

Q. 2. Esso Standard Oil Company was formerly Standard Oil Company of New Jersey, was it not?

A. Yes sir.

Q. 3. It changed its name?

A. That is correct.

Q. 4. And Standard Oil Company of Louisiana and the Standard Oil Company of New Jersey were merged several years ago, were they not?

A. That is correct.

Q. 5. During 1943 and 1944, and on until the merger, was it the Standard Oil Company of Louisiana?

A. Yes sir.

Q. 6. During the war period, did you receive a special assignment, Mr. Goldschmid?

A. I did. I formerly was in the tank car sales department, and I was especially assigned as a Coordinator of Transactions with the United States Army and Navy.

Q. 7. Are you familiar with the contracts, which have been referred to as "service contracts", relating to the receiving, handling, storage and delivery of Government [fol. 453] gasoline at the Memphis Terminal?

A. I am, yes sir.

Q. 8. Was it your job to see that those contracts were performed in accordance with the directions of the Government?

A. Yes sir.

Q. 9. Prior to the contracts that are filed as exhibits, Mr. Goldschmid, was there another service contract covering the year 1943, or part of 19-?

A. Yes sir, there was.

Mr. Waller: I would like to reserve an exhibit number for that. We will put it in when we get a copy and make it Complainant's Exhibit No. 35.

(Document to be supplied, marked Complainant's Exhibit 35, Witness Goldschmid, and filed in evidence.)

Q. 10. Do you recall when it was when you received this special assignment?

A. That was at the beginning of the war, when the requirements of the Air Corps became so tremendous that it required almost constant handling.

Q. 11. Then you were performing these duties prior to January 1, 1944, and continued on until June 30, 1946, when the contracts terminated?

A. I started prior to 1944, and I was sent out of the office in the latter part of 1945.

Q. 12. You were there in January, 1944?

A. Yes sir.

[fol. 454] Q. 13. And throughout that year?

A. Yes sir.

Q. 14. And the early part of 1945?

A. That is correct.

Q. 15. Where was your office?

A. My office was at the General Offices of Standard Oil Company of Louisiana at Union and Bellevue, in Memphis, Tennessee.

Q. 16. That was in the business office?

A. Yes sir.

Q. 17. Who was the foreman at the Terminal at that time?

A. The foreman was Mr. Sleeker. The Superintendent was Mr. Stevens.

Q. 18. Mr. Sleeker is the gentleman who has been here today?

A. Right here.

Q. 19. Did you maintain contracts with Mr. Sleeker at the terminal?

A. Yes sir.

Q. 20. Did you also maintain contacts with Wright Field?

A. That is correct.

Q. 21. By telephone, telegraph, or by what method?

A. All methods, Mr. Waller, telephone, letter, wire, and personally.

Q. 22. When you had telephone and telegraph communication, who paid for the charges?

A. The telephone calls and telegraph charges were always paid by the Army.

[fol. 455] Q. 23. In other words, telephone calls were made collect?

A. Yes sir.

Q. 25. Were any Army personnel located there at Memphis to see to the proper performance of these service contracts?

A. No sir, the only Army personnel at Memphis was a Petroleum Traffic Office. That had nothing to do with the contracts, except transportation.

Q. 26. That is transportation from where to where?

A. From Memphis to any place.

Q. 27. You mean to Army bases?

A. Yes sir.

Q. 28. Were there any Army inspectors located at Memphis?

A. Yes sir, there were two assigned to Memphis.

Q. 29. What were their functions?

A. Their functions were to check receipts from barges into the terminal, and inspect gasoline shipped out of the terminal to the various air bases.

Q. 30. And were there reports made to Wright Field?

A. Yes sir.

Q. 31. How did the aviation gasoline that was handled pursuant to these service contracts come into Memphis?

A. It came generally by barge, with a few exceptions of tank cars. The recognized practice was barge. We did not have proper facilities for tank cars.

Q. 32. During January, 1944, did the gasoline all come in by barge?

A. Yes sir.

Q. 33. Was there a shortage of tank cars during the war?

[fol. 456] A. Yes sir, there sure was.

Q. 34. It is in evidence that these shipments in January, 1944 came in by Federal Barge Line, Husky Transit Corporation, Mississippi Valley Barge Line, and Terry Dalehite Company. Do you know who those companies were?

A. Generally, I do. The Mississippi Valley Barge Line and the Federal Barge Line are wellknown common carriers on the Mississippi River, transporting dry and wet products up and down the Mississippi River.

Q. 35. As to the other two, Husky Transit Corporation and Terry Dalehite Company, did the Standard Oil Company of Louisiana have any connection with those concerns?

A. No sir.

Q. 36. There are not affiliated corporations or anything of the kind?

A. No sir. We never heard of them until they brought the fuel in.

Q. 37. Did the Standard Oil Company of Louisiana have anything to do with ordering this aviation gasoline, handled under these service contracts, into the Memphis Terminal?

A. No sir, they did not.

Q. 38. I notice Complainant's Exhibit 1, and these other service contracts—I wish you would refer to Exhibit 1, Article 1 (a) which provides that services included in the contract are, among other, "(1) To order stocks of fuel to be shipped to Contractor's storage facilities as may be [fol. 457] directed by the Contracting Officer." Did the Government ever order the Standard Oil Company of Louisiana to order stocks of fuel to be shipped to the storage facilities?

A. They did not.

Q. 39. How did you know when this gasoline was coming into the Memphis Terminal?

A. We were advised by Wright Field, either by telephone, telegram, or by letter.

Q. 40. Did it come in on commercial bills of lading or Government bills of lading?

A. Government bills of lading.

Q. 41. Among the exhibits in this case is Complainant's Exhibit No. 26. I will pass that to you and ask you if you can state what that is, and the purpose of it?

A. This is a pumping contract for pumping Army-owned fuel out of barges that came to Memphis for discharge into our storage. I might elaborate on that a little bit. To give you a background, when the Air Corps first started sending their fuel into Memphis, we were not equipped to pump

out barges. The reason was that our own barges have their own pumps on them. The barges that the Government was able to move this fuel in were not so equipped. It became necessary for them to contract to get this fuel pumped out. There was only one concern in Memphis at the time, and that was a concern by the name of Warner & Tamble, who had a "donkey". A "donkey" is a coal-fired steam boiler on the stop of a steam barge, which the Coast Guard pro-
[fol. 458] hibited the Air Corps using, because of a fire hazard. This steam "donekey" that was coal-fired had to be set right next to a barge of highly volatile fuel, and it was a tremendous hazard and they wouldn't permit them to use it. The Air Corps then came to us and requested that we acquire a pumping unit that was a steam pump hooked to our lines, and pump their fuel out of the barge.

Q. 42. Did you have anything to do with negotiating the pumping contract?

A. Yes sir.

Q. 43. You said these barges that the Government was able to obtain were different types from the barges the Company used. I will ask you if back in 1943, some of this gasoline, this aviation gasoline owned by the Government, was transported in Company-owned barges?

A. Yes sir.

Q. 44. And that was discontinued?

A. Yes sir.

Q. 45. Prior to 1944?

A. Yes sir, that is correct.

Q. 46. Also among the exhibits is Complainant's Exhibit 27. I will pass that to you and ask you if you will state what that is?

A. This is an invoice that our company rendered against this pumping contract for definite quantities of Government owned fuel that was pumped out of specific barges.

Q. 47. Did that cover the month of January, 1944?

[fol. 459] A. I believe it did, yes sir. Yes, sir, it is right on the face, "January, 1944".

Q. 48. To whom was it billed?

A. To the Finance Officer, U. S. Army, Patterson Field, Fairfield, Ohio.

Q. 49. Was that the same as Wright Field, or contiguous with it?

A. Yes sir.

Q. 50. I wish you would next examine Exhibit 34 and state what that is and whether you had anything to do with negotiating that?

A. Yes sir, this is a lease on three 10,000-barrel tanks by Standard Oil Company of Louisiana, from Lion Oil Company at Memphis.

Q. 51. What led up to that contract, and what did you have to do with it?

A. The conditions under which this contract was negotiated were simply that the Army Air Forces needed additional storage that we couldn't provide. It was found that Lion had, or had made available, certain storage that it was felt that it could not be used as it was, the reason being that their pumping lines which led to the river oftentimes during high waters became submerged. Their bulk plant where the gasoline is normally dispensed was small and was not conducive to large transport truck operations. Just across the street from these tanks we had already built what is commonly called a "loading rack" for truck delivery. We felt that certain lines that we had to the [fol. 460] river, which were large lines for unloading barges, could be utilized and were utilized in pumping into these tanks. The tanks were tied in or manifolded, as we call it to our pumping lines and also to our loading rack, which was just across the street. It was likewise felt that Lion, operating as a distributer in Memphis, did not have the proper personnel to receive and dispense gasoline, and we had established sufficient personnel for around-the-clock operation at our terminal, and we were requested to lease these tanks from Lion, at a specific fee named in the lease, and that same amount was collected by Standard Oil Company from the United States Army Air Forces.

Q. 52. You stated that the Government had some inspectors there at Memphis for the purpose of inspecting this gasoline when it was received and also when it went out?

A. Yes sir.

Q. 53. What was the procedure with reference to inspection of gasoline upon arrival?

A. Well, these Government Inspectors were on hand upon the arrival of a barge, and they checked to see that the barge was properly sealed. After the seals were broken, they checked temperature and measurement in comparison with the movement certificate. They likewise gauged the storage tanks from the standpoint of gallons and temperature, before the fuel was pumped from the barge, and following the pumping.

Q. 54. To whom did these inspectors make their reports?

A. They made all of their reports direct to Wright Field.

[fol. 461] Q. 55. Mr. Goldschmid, were these tanks, including the Lion tanks, utilized for storing reserve aviation gasoline, or for what purpose were they utilized?

A. Mr. Waller, the tanks, in my opinion, were no more than a funnel. I say that because upon arrival of a barge, and generally there were a tremendous number of tank trucks waiting for the fuel to be pumped out, and constantly there was dumping into tank trucks at the same time the fuel was being pumped out of the barge, meaning just this, that there was not sufficient fuel there when the trucks arrived and many times they waited until fuel was pumped from the barges before they could start loading.

Q. 56. Would it have been possible to have pumped directly from the barges into these tank trucks?

A. No sir.

Q. 57. That was physically impossible?

A. Yes sir.

Q. 58. How did the company know when and where to ship this gasoline or deliver it?

A. Well, we primarily received a product release that was sent to us from Wright Field at the beginning of each month, which set up definite bases that were to draw on our terminal. These releases contained estimated amounts of products that that particular base would draw from our terminal.

Q. 59. Look at Complainant's Exhibits 28 and 29, Mr. Goldschmid, and see if those are the releases for the month of January, 1944?

[fol. 462] A. Yes sir.

Q. 60. Exhibit 28 covering 100 octane gasoline and Exhibit 29 what?

A. Grade 91 gasoline.

Q. 61. You received those monthly?

A. Yes sir. However, upon receipt of these, we moved no gasoline. The next procedure was followed by the Supply Officers at the various designated bases, arranging for quantities that they wanted on a schedule. In other words, if a base had a tremendous amount of estimated gallons, included on the release, and little storage, they spread their deliveries over a period and took so many trucks per day.

Q. 62. Did the Supply Officers at those bases communicate with you as to the schedules for delivery?

A. Yes sir. No gasoline moved even after the receipt of these releases, until the Supply Officer requested it.

Q. 63. You said the Government or the Army had some Transportation Officers at Memphis?

A. Yes sir.

Q. 64. What was their function?

A. Their function was to expedite movements of fuel for the Government, to provide means of transportation, and so forth, trucks or tank cars. They were there to see that sufficient transportation was provided in order to meet the requirments of the various Supply Officers.

Q. 65. Did they make arrangements with any common [fol. 463] carrier trucking lines?

A. Yes sir, they did.

Q. 66. What trucking lines?

A. They made arrangements with two in Memphis, Dealers Transport Company and the second was Motor Transport Company. They were both common carrier.

Q. 67. Was any of that Government owned aviation gasoline transported in company owned equipment?

A. Yes sir, we moved small quantities to the Memphis Municipal Airport.

Q. 68. How did that come about?

A. Well, as you can probably visualize, from our Terminal to the Memphis Municipal Airport is a short haul. The rates agreed upon were considered by the truckers as unfavorable, and their trucks were all utilized on long hauls. The result was that the Air Corps Transportation Section

insisted in view of the fact that no other transportation was available, that we transport to the Memphis Airport.

Q. 69. Did a representative of Wright Field come to Memphis to make that insistence?

A. Yes sir.

Q. 70. And the Company agreed to do that?

A. Yes sir.

Q. 71. Under the Services Contract?

A. Yes sir.

Q. 72. Aside from the Memphis Airport, was any of the gasoline involved in this case transported other than by common carrier or Government truck?

A. No sir.

Q. 73. Were Government trucks used at all?

A. Upon occasion, yes.

[fol. 464] Q. 74. But the greater majority of it was by common carrier?

A. Yes sir. I might add that the Government trucks that were commonly referred to as "Government Fuel Service Units", were not built for highway traffic. They were extremely heavy and had unusual pumping and filtering facilities that were not conducive to highway operation. They frankly needed all the units that were available for putting the gasoline into aircraft, and there were not surplus ones for over-the-road hauling.

Q. 75. On shipments by these common carrier trucks, were commercial bills of lading or Government bills of lading utilized?

A. Government bills of lading.

Q. 76. Who paid for the transportation?

A. I asume the Air Corps. Standard Oil Company did not pay it.

Q. 77. What was the procedure with reference to the inspection of this outbound gasoline by the Army Inspectors?

A. Well, Army Inspectors checked the trucks upon arrival to see that there was no liquid in them for possible contamination. They checked the loading meters to see that the quantity shown on the bill of lading was in the truck, witnessed the sealing, and took the temperature of the product contained in the truck.

Q. 78. When this gasoline was delivered to these common carrier trucks, did Standard Oil Company of Louisiana have anything further to do with that gasoline?

A. None whatever, no sir.

[fol. 465] Q. 79. Look at Complainant's Exhibit 1, Service Contract, and I will refer to Page 2 of the Supplemental Agreement No. 1. I think this has already been read into the record, and I won't repeat it, but there are three types of transportation referred to there, are there not?

A. Yes sir.

Q. 80. And on the schedule of payment, there is a different price per gallon as between Type I on the one hand and Type II or Type III, on the other hand?

A. That is correct, yes sir.

Q. 81. Type I is the company-owned equipment, or commercial transport trucks arranged for by the Company?

A. Yes sir.

Q. 82. If I understand your testimony, the only deliveries pursuant to Type I were at the Memphis Airport?

A. Yes sir.

Q. 83. What was the Army unit at the Memphis Airport?

A. 70th Sub Depot.

Q. 84. Mr. Goldschmid, I want to hand you Exhibit "A" to the Bill of Complaint and ask you if that correctly shows the tank numbers into which the different grades of Government owned aviation gasoline were pumped during the month of January, 1944, and I will then get you to state for the record, if you will, what grade gasoline was pumped into each of the separate tanks, that is, by numbers, Tank No. 7 and No. 8, and so forth, if you know?

A. These [illegible] show the tank and the grade. In Tanks 7 and 8, Grade 91 was pumped. In Tanks L-1, L-2, and L-3, [fol. 466] in which the "L" indicates "Lion tanks, was Grade 87. In Tanks 16 and 17—I beg your pardon, in Tank 17 was Grade 130.

Q. 85. Did the Standard Oil Company of Louisiana, during any of this period involved, in the performance of these service contracts, own any grade 130 aviation gasoline and put it in any of these tanks?

A. They did not.

Q. 86. What about Grade 87?

A. We didn't own any 87.

Q. 87. What about Grade 91?

A. We owned some Grade 91.

Q. 88. Who was that released to?

A. That was for release to the Commercial Airlines.

Q. 89. And during the month of January, 1944, was any such Grade 91 gasoline owned by the Company for release to the airlines, pumped into these tanks Nos. 7 and 8?

A. No sir.

Q. 90. That answer, of course, is for the month of January, 1944?

A. Yes sir.

Q. 91. You didn't mean to say that in other months there was not some pumped?

A. No sir. I understood your question to be January, 1944.

Q. 92. Mr. Goldschmid, if you are in position to do so from your knowledge of the situation, derived from the performance of the duties you have outlined, state whether [fol. 467] or not all of the aviation gasoline received by Standard Oil Company of Louisiana in January, 1944, and succeeding months while you held that assignment, pursuant to the Service Contracts already referred to, was owned by the United States Government prior to the time of its receipt in Tennessee and at all times up to and including the time of its delivery by the Company by common carrier truck, government owned truck, or the Sub-Depot at the Memphis Airport?

A. It was owned by the Government.

Q. 93. Was any of this aviation gasoline refined, manufactured, produced, or compounded within the State of Tennessee?

A. No sir.

Q. 94. Did the Standard Oil Company of Louisiana exercise any independent control over any of this Government owned gasoline, that is to say, control other than as is expressly directed by the contracting officer of the Government?

A. No sir.

Mr. Green: The record will show the question and the answer is subject to objection stated when the first question of that nature, or the first two questions of that nature were asked by Mr. Green.

Mr. Cummings: That is all right.

Mr. Waller: I don't remember the basis of the objection.

Mr. Green: It was understood that that question was sub-
[fol. 468] ject to an objection, and objection was made to the question and the answer, and we agreed that when the question was asked at a later time, the question and answer would be subject to the same objection.

Mr. Waller: On behalf of my client, if these questions are objected to, I would like to have the grounds stated, because I don't recall. One witness may be better qualified to answer than another.

Mr. Cummings: My recollection is that at least two of the grounds of the objection, one was immateriality, as based upon written instruments; and the other was the best evidence rule, because there are certain things he is testifying about that are evidently the subject of records which he has not produced.

Mr. Green: The third objection was that it was not material.

No questions.

Mr. Cummings: Cross examination of this witness is made without waiving any objections heretofore made to the testimony of this witness on any ground.

Cross-examination.

By Mr. Cummings:

X Q. 1. How long did your company continue to make deliveries of aviation gasoline from the Memphis Terminal to the Memphis Airport in your own trucks?

A. My recollection is that they made them until the time I left, in the latter part of 1945.

[fol. 469] X Q. 2. Would you say then that those deliveries were continuously made from January 1, 1944 up until the time you left in the latter part of 1945?

A. Yes sir.

X Q. 3. That gasoline was delivered in trucks belonging to Standard Oil Company?

A. Yes sir.

X Q. 4. The gasoline was owned by whom?

A. The Government.

X Q. 5. Did you pay, I mean by "you", did your company

pay a 3% Gross Receipts Tax for performing that transportation to the State of Tennessee?

A. I couldn't answer that. Those payments would be handled by our Traffic Department.

XQ. 6. You were transporting that gasoline, which you say was the property of the United States Government, under a contract with the United States Government?

A. Yes sir.

XQ. 7. From the terminal at Memphis to the Airport?

A. Yes sir.

XQ. 8. That was covered by your service contracts which were in effect from time to time during the period about which I have asked you?

A. Yes sir.

XQ. 9. Can you give us the approximate capacities of these various tanks shown on Exhibit A to the original bill, starting with No. 7 on the list?

A. Offhand I am not too familiar with the capacities of [fol. 470] these tanks, but if I might add, we will have a witness that can give you that information.

XQ. 10. Just for the record can you state the approximate capacity? I don't care about it being too accurate?

A. I would say that they are approximately 20,000 barrels.

XQ. 11. How much is that in gallons?

A. Roughly 840,000 gallons.

XQ. 12. That could be the approximate capacity of each of the tanks shown on Exhibit A?

A. No sir, they vary.

XQ. 13. From what to what?

A. Those Lion tanks, I know the capacity of those. They were 10,000-barrel tanks.

XQ. 14. 420,000 gallons?

A. Yes sir.

XQ. 15. At any time during the period that you were responsible for the coordination between your company and the Army Air Corps, commencing in January, 1944, did your company mingle any aviation gasoline in the tanks shown on Exhibit A belonging to the Government, with aviation gasoline owned by your company or by others?

A. Was the question, "At any time"?

XQ. 16. Yes.

A. Yes, sir, we did.

X Q. 17. From what tanks, meaning by the question to preclude these tanks if that be the case, did your Company withdraw aviation gasoline for delivery to commercial airlines?

[fol. 471] A. Normally we had our own designated tanks, but upon occasion we withdrew from the tanks as shown here as containing 91 fuel.

X Q. 18. Were you still with the Company and still responsible for the service contracts after the allocation of aviation gasoline was suspended and terminated?

A. Yes sir.

X Q. 19. Did your company after that time continue to mingle aviation gasoline owned by the Company with the gasoline of the same type owned by the United States Government in these tanks?

A. I don't believe they did.

X Q. 20. Do you know how that was handled thereafter?

A. As I recall it, we used gasoline out of our own storage or storage that was not designated for Government fuel, dispensing the gasoline to the airlines via transport to underground storage tanks at the Airport.

X Q. 21. Would it be accurate to say, then, that all of the mingling of gasoline owned by your company with the Government owned gasoline in the tanks shown on this exhibit, or other tanks at your Memphis Terminal, occurred prior to the time the allocation of aviation gasoline was terminated?

A. Yes sir.

X Q. 22. During the month of January, 1944, could you give me your average daily inventory on these tanks, shown by Exhibit A to the original bill?

A. No sir, I could not.

X Q. 23. Were you responsible for that information?

A. It only was in a supervisory capacity. That informa-
[fol. 472] tion was conveyed to the Army by the Terminal.

X Q. 24. Do you or not mean to leave the impression that by your direct testimony that the storage tanks which were designated for you as Army aviation gasoline, were emptied practically as fast as they were filled?

A. Yes sir.

X Q. 25. These barges that came in, I think I have the figures here, for example on January 11, 1944, you received a barge ROR-103, put in Tank L-1, it appears to be 224,988 gallons. Will you state as a practical proposition how many tank trucks it would take to move that particular quantity of gasoline as rapidly as possible, with your facilities at Memphis?

A. The average tank truck was approximately 4,000.

X Q. 26. How many trucks would it take?

A. (Makes calculation.) Approximately 56 trucks.

X Q. 27. What is your loading capacity for truck transportation at the Memphis Terminal?

A. We load in approximately 20 minutes.

X Q. 28. I say for how many trucks?

A. Oh, three, as I recall it, at one time. Is that the answer to the question?

X Q. 29. Yes. Approximately how long would it take to empty a barge of some 224,000 gallons of gasoline?

A. I would say roughly 12 hours.

X Q. 30. You are not responsible for the figures, I believe you said a minute ago, which would show the inventory in the tanks at the time of these deliveries shown on Exhibit A to the original bill?

[fol. 473] A. No sir, that was designated to the Terminal operating where the tanks are.

X Q. 31. Were there periods of time when you had a more or less static inventory of some volume in these tanks shown on Exhibit A, containing inventory, I might say, of substantial volume?

A. No sir, I would say it would be just the opposite, that we had occasions when those tanks were without any products, more often that we had them with large quantities of gasoline.

X Q. 32. Why did it take so many tanks, Mr. Goldschmid?

A. Well, you have three grades primarily, of fuel.

X Q. 33. You have seven tanks——

Mr. Waller: Six at Memphis.

By Mr. Cummings:

XQ. 34. Yes sir. They were all ties in on the same circulating receiving and distribution lines, weren't they?

A. System, yes. We had to have certain separations because of grades.

XQ. 35. On the same day I notice from Exhibit A to the original bill, January 6, 1944, you put the same grade of gasoline, Grade 91, from two shipments in Tanks 7 and 8, relatively small quantities in comparison with the total capacity of the tanks as testified to. Why was that, for loading reasons or unloading reasons, I mean, or because of the stock already in the tanks?

A. I would say that was to facilitate the unloading.

XQ. 36. Will you look and see which barges brought in [fol. 474] those shipments on January 6, 1944?

A. DPC 113 UBL.

XQ. 37. The same barge brought in both of the items that were broken down?

A. Yes sir.

XQ. 38. Would it facilitate the unloading to be unloading from the same barge into different tanks?

A. Yes sir.

XQ. 39. You had two pumps?

A. We had rigs where we could separate the product. We only had one pump and one discharge line, but that could be separated. In other words, these tanks, as you visualize a tank, can be closer to the pump and because of its proximity, more gasoline will go into the closer tank than the one that is farther away.

XQ. 40. Let's see if I understand you. I am afraid I don't. You said these barges didn't have any pumps of their own?

A. That is correct.

XQ. 41. And that you finally did get available a pump that was satisfactory to the Coast Guard, Commander Schutt I take it, and you had only that one pump, is that correct?

A. Yes sir.

XQ. 42. So that total output from the barge came through one line as it was pumped out?

A. Yes sir.

XQ. 43. And your position is that it would facilitate the unloading of that barge by dividing the load from the [fol. 475] the main pumpout into two separates tanks?

A. Yes sir.

XQ. 44. Are you responsible for the records of your company, which would reflect the actual distribution of the gasoline which was released from the Memphis Terminal under authority of Exhibits 28 and 29, which are before you?

A. I was only responsible from this standpoint. We had constant telephone contracts with Wright Field. I have tried to keep a more or less memorandum record of what had moved, so that if a supply officer would call, I could tell him what was en route, or if Wright Field wanted the approximate withdrawals before their Statistical Department got their figures correlated, I attempted to carry such a record.

XQ. 45. That answers my question except for the part of it which referred to the inquiry as to whether or not you were responsible for or had in your custody the company records which would show?

A. No sir.

XQ. 46. You will have witnesses here who can show that, I take it, or a witness?

XQ. 53. Were you responsible for making of records as to gasoline taxes to the State of Tennessee during any period of time that you were Coordinator?

A. No sir.

XQ. 54. At the Memphis Terminal?

A. No sir.

[fol. 476] XQ. 55. You don't have any such records in your possession, and are not in position to testify about that?

A. No sir.

Further Deponent saith not.

A. W. Goldschmid, By T. Roy Hix.

Sworn to before me when taken, the 14th day of April, 1950. T. Roy Hix, Notary Public, State at Large. (Seal.)

My commission expires April 5, 1954.

DEPOSITION OF T. G. SLEEKER

T. G. SLEEKER, the next witness, being first duly sworn, deposed as follows:

Direct examination.

By Mr. Waller:

Q. 1. Mr. Sleeker, what is your residence and occupation?

A. I am foreman of the Esso Standard Oil Company, Riverside Terminal at Memphis. My home is in Memphis, Tennessee.

Q. 2. How long have you had that position?

A. Since October, 1942.

Q. 3. At that time it was the Standard Oil Company of Louisiana and later the Standard Oil Company of New Jersey, and now it is the Esso Standard Oil Company?

[fol. 477] A. Yes sir.

Q. 4. You spoke of the Riverside Terminal, Mr. Sleeker, what is the Riverside Terminal?

A. It is a storage depot for petroleum products.

Q. 5. We have been referring in this case to the storage tanks at Memphis. Are those storage tanks commonly referred to as the Riverside Terminal?

A. Yes sir.

Q. 6. I mean the tanks and facilities?

A. Yes sir.

Q. 7. Your immediate superior is who?

A. Mr. C. E. Stevens.

Q. 8. He is the Superintendent of Riverside Terminal?

A. Yes sir.

Q. 9. As Foreman of the Riverside Terminal, Mr. Sleeker, what duties and responsibilities did you have in connection with Government owned aviation gasoline handled by the Standard Oil Company at Louisiana, under the Service Contracts that have been filed as exhibits in this case?

A. To supervise the unloading and storing and shipping of these products. Also to keep separate records that pertain to inventory, for the Accounting Department.

Q. 10. Have you refreshed your memory as to the aviation gasoline which came in for the Government for the month of January 1944?

A. Yes sir.

Q. 11. By what method of transportation did that gasoline arrive at the Riverside Terminal?

[fol. 478] A. By barge.

Q. 12. Was that by company barge or by common carrier barge?

A. Common carrier barges.

Q. 13. Do you know what sort of organizations the Husky Transit Company and the Terry Dalebite Company were?

A. I presume they were river transportation companies.

Q. 14. At least the Standard Oil Company of Louisiana had no connection with them?

A. No connection other than just receiving the boats as they came in.

Q. 15. Just to receive the cargo?

A. Yes sir.

Q. 16. Did this gasoline that was handled in January, 1944, pursuant to the service contract, come in on Government bill of lading or commercial bill of lading?

A. Government bill of lading.

Q. 17. Before these barges arrived, did you have notice that they would arrive?

A. Yes sir.

Q. 18. How did you receive that notice?

A. Well, Mr. Goldschmid notified us that he had been notified from the Army Air Forces that the barge was supposed to arrive at an approximate date. We also received through the mail, usually in advance of the receipt of the barge, the copies of the Government bills of lading and the inspection certificate on said barge, that were issued at point of loading.

[fol. 479] Q. 19. Will you look at Complainant's Exhibit 15, Mr. Sleeker, and state what that is?

A. This is a copy of the Government bill of lading that accompanied, or was mailed to our office on Barge DPC-113-UBL.

Q. 20. Is that known as the "Property Received" copy of the bill of lading?

A. Yes sir.

Q. 21. That particular copy of the bill of lading is not fully executed, is it?

A. No sir, it is not.

Q. 22. What became of that particular copy of the bill of lading, what was done with it?

A. The one that was executed?

Q. 23. No, the one that you have in your hand?

A. This one was kept in our files in the Terminal.

Q. 24. And it has been there until it was produced for the purpose of this hearing and photostated?

A. Yes sir.

Q. 25. So that is your retained copy of the bill of lading?

A. That is correct.

Q. 26. Do you have the custody, or did the Standard Oil Company of Louisiana have the custody of the original of the bill of lading?

A. No sir.

Q. 27. What became of that?

A. The original bill of lading, after the receipt of a ship- [fol. 480] ment was accomplished—to explain that word, that is a term we got from the correspondence somewhere that the procedure was to acknowledge receipt of this barge and turn the original over to the carrier and he in turn supported his freight bill with this receipted original bill of lading.

Q. 28. His freight bill to whom?

A. Freight bill to the Air Forces.

Q. 29. So, after you accomplished the original of the bill of lading and turned it over to the carrier showing the receipt of the cargo, you had nothing further to do with it?

A. No sir.

Q. 30. Will you examine Complainant's Exhibits 16, 17, 20, 22, 24, 25, and state whether or not those are also the copies of the bills of lading relating to those particular shipments which were retained by you at the Riverside Terminal and produced in preparation for this hearing?

A. Yes sir.

Q. 31. And will you answer the same as to those shipments with respect to what happened to the original?

A. Yes sir, the original was accomplished in the same manner on all of these.

Q. 32. I believe that one or two of them were diverted shipments?

A. Yes sir.

Q. 33. What was the procedure with the shipment when [fol. 481] it was diverted, did the bill of lading then come with the cargo or later?

A. Usually later, because evidently it was forwarded to the original destination at first, and the barge usually would arrive before the diverted bill of lading.

Q. 34. But when the bill of lading did arrive, you accomplished it as you would in ordinary cases?

A. Yes sir.

Q. 35. Where a cargo arrives, I mean by that a barge of Government owned aviation gasoline, was it necessary to notify anyone representing the State of Tennessee before it was unloaded?

A. Yes sir. We notified the local office of the Gasoline Division of the Department of Finance and Taxation that we expected to unload a barge and the approximate time it was to arrive.

Q. 36. Why was that necessary, with respect to this Government owned gasoline?

A. All barges are inspected by State personnel, a sample is taken out of the barge by the State personnel, and our Unloading lines on the docks are sealed by those representatives of the State, and they are the ones that break the seals and tell us to proceed to unload the barge. That is after they have inspected the load.

Q. 37. Describe the method of sealing?

A. We have 12 lines on our dock, and they run parallel to each other. Of course each line has a valve. A chain is [fol. 482] run through the wheels on these valves, a double chain, sealed at one end and looped around and comes all the way through to the other side of the pipelines and a State seal is affixed at the two ends of this chain.

Q. 38. So that seal has to be broken before you can unload?

A. Before we can open the valve to receive the cargo.

Q. 39. And when one tank is sealed, they are all sealed?

A. Yes sir.

Q. 40. So the regular procedure was to notify the State Inspector and let him break the seal?

A. Yes sir.

Q. 41. And he was there then to take samples of the gasoline or other products?

A. Yes sir.

Q. 42. And determine the quantity?

A. Yes sir.

Q. 43. Were Army inspectors also there with respect to the Government gasoline?

A. Yes sir.

Q. 44. I believe they made their reports directly to Wright Field, did they?

A. Yes sir.

Q. 45. These State Inspectors, did they make out and sign Inspector's Reports covering all the gasoline that was taken in at the Riverside Terminal?

A. Yes sir.

[fol. 483] Q. 46. What was the procedure by which the Army inspectors determined the quantity?

A. They witnessed the gauging of the shore tanks, and if necessary to draw out of the tank into trucks while the barge was being unloaded, he read the meter of the shore tank, the meter to the trucks, and after the barge had been completely discharged, he reread the meter and gauged the tank again and the amount the tank received plus the amount that went through the meter was the amount determined received out of the barge.

Q. 47. Did you make out a ticket of any kind for the Stock Accounting Department?

A. Yes, sir, we made what we call outturn tickets.

Q. 48. That showed the same quantity?

A. It showed the same information.

Q. 49. That was transferred to the Stock Accounting Department of the Company?

A. Yes sir.

Q. 50. Were you in communication with Mr. Goldschmid regarding the monthly releases on this Government owned gasoline?

A. Yes sir.

Q. 51. Did he give you copies of those monthly releases from Wright Field?

A. Ordinarily he phoned the amount to be released to us. We made a record of it.

Q. 52. What information did you in turn give Mr. Goldschmid?

A. We gave him a daily inventory of the Army-owned [fol. 484] stocks on hand, plus the amounts delivered at different bases for the past 24 hours.

Q. 53. When you say "delivered to the different bases," did the Standard Oil Company of Louisiana make those deliveries to the different bases or to common carrier trucks?

A. Only to common carrier trucks, with the exception of 77th Sub Depot at Memphis.

Q. 54. And those deliveries were made how?

A. By company owned trucks.

Q. 55. Did you also make any direct report to Wright Field?

A. At first we reported daily stock inventories to Wright Field, and the shipments for the preceding 24 hours, but later on a Procurement Office was set up at Birmingham, Alabama, and this information was phoned to them daily.

Q. 56. Was that an office of Wright Field located at Birmingham?

A. Yes sir.

Q. 57. What sort of an office did you call it?

A. I believe they called it a Procurement Office, as well as I remember.

Q. 58. So, after that office in Birmingham was set up, you made these reports there instead of direct to Wright Field?

A. Yes sir.

Q. 59. How did the Supply Officer at the different bases communicate their desires with reference to having their quotas shipped to them?

[fol. 485] A. All of our instructions as to where the product was to be shipped came through Mr. Goldschmid. He received all the instructions from the Supply Officer of the base.

Q. 60. Did he also give the communication to the transport companies that had been employed by the Government?

A. Yes sir.

Q. 61. Then what was your procedure with reference to releasing that gasoline?

A. The transport companies would notify us by phone

that they intended to run certain trucks for the next 24-hour period, and we would prepare the bills of lading in our office during the day that would be run for that period, and turn them over to the man that actually did the loading on our loading rack.

Q. 62. Were those bills of lading signed by a Wright Field officer?

A. Yes sir.

Q. 63. And then when were the dates and seal numbers filled in?

A. When the truck was loaded.

Q. 64. I mentioned seal numbers, who sealed those trucks?

A. The trucks were sealed by the Air Forces Inspectors.

Q. 65. That was part of their job?

A. Yes sir.

Q. 66. Mr. Sleeker, I will ask you to refer to Complainant's Exhibits 30, 31 and 32, and state what they are?

A. These are copies of the Government bills of lading issued at our plant for truck shipments of Army-owned [fol. 486] fuels to transportation officers at various air fields.

Q. 67. Are those three typical bills of lading for the month of January, 1944?

A. Yes sir, they are.

Q. 68. And are these memorandum copies of the bills of lading the copies signed by the carrier and given to you as a receipt from the carrier for the gasoline?

A. Yes sir, they are signed by the carriers' drivers, as a receipt for the gasoline.

Q. 69. And kept as a part of your terminal records?

A. Yes sir.

Q. 70. And they have been in your custody at the Riverside Terminal until produced here for the purpose of this case?

A. Yes sir, they have.

Q. 71. Of course there were a great many of those bills of lading of similar type during that month?

A. Yes sir, approximately 700, I should say.

Q. 72. And are they here and available for inspection by opposing counsel?

A. Yes, they are.

Q. 73. With reference to the shipments to the Army 70th

Sub Depot at Memphis Airport, you stated that that gasoline was hauled in company trucks?

A. Yes sir.

Q. 74. What sort of receipt was obtained with respect to those deliveries to the Memphis Airport, and I will ask you to refer to Complainant's Exhibit 33?

[fol. 487] A. This report, this copy here, is a signed copy, evidently by a truck driver. He was instructed to return a copy signed by the Receiving Officer at the Airport, which was returned to the Accounting Office as the Company's receipt for this load of gasoline.

Q. 75. Whose signatures are on that document?

A. J. W. Jackson.

Q. 76. Who was he?

A. Truck driver.

Q. 77. Who wrote on there "70th Sub-Depot," "Received by"? you notice the signature and "70th Sub-Depot"?

A. That was written by the man that filled in this, our loader and checker. That is his handwriting, whose initials are over here, D. H. S.

Q. 78. That was the type of record that you kept to show those deliveries to the Memphis Sub-Depot?

A. No, this copy is one of the records we furnished the Accounting Office from the Terminal to substantiate our stock disbursements.

Q. 79. Mr. Sleeker, should there be in the Accounting Department of the company at Memphis a duplicate of this shipping notice, Complainant's Exhibit 33, signed by a representative of the 70th Sub Depot?

A. Yes sir.

Q. 80. Mr. Sleeker, will you procure a photostatic copy of the duplicate of this particular shipping notice, with the signature of the representative of the 70th Sub-Depot, will you produce that and file it as Complainant's Exhibit 33-A?

[fol. 488] A. That is in the Department in the files of the Division Office or Stock Department files.

Q. 81. You can get it from the Accounting Department?

A. Yes sir.

(The document referred to, to be supplied and marked Complainant's Exhibit 33-A, Witness Sleeker, and filed in evidence.)

Q. 82. With reference to the bills of lading on the shipments that went out by common carrier truck, where did those copies of the Government bills of lading go?

A. There were two copies mailed to the Commanding General, Wright Field. The original and two copies went to the Transportation Officer at destination. The copy known as the "shipping order" which is the carrier's order to haul the stuff, was turned over to the carrier. There was a couple of copies of the bill of lading kept in our files at the Terminal.

Q. 83. You stated that the Army inspectors sealed those trucks before they left the Riverside Terminal?

A. Yes sir.

Q. 84. After you received a signed copy of the bill of lading from the carrier, did the Standard Oil Company of Louisiana have anything further to do with that gas?

A. No sir.

Q. 85. Going back a moment to the deliveries to the Memphis Airport, were there also a great many of those deliveries during the month of January, 1944?

A. As well as I recall, not so many. I will have to look [fol. 489] at the records to be sure of the quantity.

Q. 86. In any event, the copy of the shipping notice that is marked Complainant's Exhibit 33, and the one that will be marked Complainant's Exhibit 33-A, are typical of the type of receipts that were obtained?

A. Yes sir.

Q. 87. The copies of those shipping notices similar to the one filed as Complainant's Exhibit 33, are here on the table for examination by opposing Counsel, are they not?

A. Yes sir.

Q. 88. I believe I asked one of the witnesses what the designations on these barges meant, and they said DPC meant "Defense Plant Corporation." Do you know what those other designations are, LTC and ROR?

A. LTC means "Lake Tankers' Corporation," and in other words, the initials on the barge conformed with the name of the owner of the barge, the transportation com-

pany. However, they might be transported by another carrier rather than the carrier that owned the barge. It might be leased.

Q. 89. Like a freight car might have different owners?

A. Yes sir, ROR was for the "Republic Oil Company." Those are the initials they used on their barges.

Cross-examination.

By Mr. Dodson:

X Q. 1. Mr. Sleeker, you testified that you were advised by Mr. Goldschmid whenever there would be a shipment to arrive, in other words, you were advised that they would [fol. 490] be arriving in the future, is that correct?

A. Yes sir.

X Q. 2. Why was it necessary that you be advised of that?

A. So we could make preparations that were necessary to take care of the unloading when they came in.

X Q. 3. What preparations were necessary to be made?

A. Well, the State inspectors had to be notified, the Government inspectors and the Coast Guard. The Coast Guard was for safety purposes only in the handling of the cargo, and at that time we were short of men and you have to have a licensed tanker man to load or unload a barge. We had very few of them and we had to try to arrange their schedules so that there would be as little as possible overtime occur, but there was a lot of it, and we just had to make preparations beforehand.

X Q. 4. When you say "we", you mean Standard Oil ompany of Louisiana, as it was then?

A. Well, that was strictly up to Mr. Stevens and I. We handled all of that, Standard Oil Company of Louisiana.

X Q. 5. You mean that by "we"?

A. Yes sir.

X Q. 6. And it was Standard Oil Company of Louisiana that furnished the licensed—what did you call him?

A. Tankermen.

X Q. 7. He was an employee of Standard Oil Company of Louisiana?

A. Yes sir.

X Q. 8. And all the other employees that had anything to do with actually handling this gasoline from the time that

it arrived there in the barge until the time that it was [fol. 491] loaded into the transport truck, that was to take it away, it was handled by Standard Oil Company of Louisiana's employees?

A. Yes sir.

X Q. 9. Exclusively?

A. Exculsively.

X Q. 10. When the bill of lading arrived at Memphis, who receipted for that?

A. What kind of a receipt do you mean?

X Q. 11. As I understood the testimony here, when the barge arrived, it was accompanied by one of these United States Government bills of lading, similar to Complainant's Exhibit No. 17?

A. Yes sir, that is correct.

X Q. 12. Rather not one but several of these. You retain one of them yourself?

A. That is correct.

X Q. 13. One of them was receipted and delivered to the carrier, as I understood your testimony?

A. Yes sir.

X Q. 14. Who receipted for the shipment, that is what I mean?

A. After the amount was verified that we received and the loss was within tolerance, we receipted at the bottom of the original bill of lading, where there was a space provided for such receipt. We only receipted for the amount of tonnage received in this barge. That was what this receipt requested, and it was signed either by Mr. Stevens [fol. 492] himself personally, or with his name on it with my initials under it.

X Q. 15. That is what I meant, either you or Mr. Stevens, as the employes, agents, and representatives of the Standard Oil Company, receipted this?

A. Yes sir.

X Q. 16. Acknowledging that Standard Oil Company had received it?

A. Yes sir.

X Q. 17. And the figure that you receipted for didn't necessarily correspond with the figure that was shown up here on this bill of lading under the description of the article, did it?

A. As well as I remember, it has been so long ago, I believe if there was a very small discrepancy, we receipted for the exact amount of tonnage as the bill of lading showed had been shipped.

X Q. 18. Suppose the exact amount of tonnage that the bill of lading showed was not received?

A. Well, it would be such a small amount in difference that it was usually short rather than over, and it would have been such a small amount that the difference would have been negligible.

X Q. 19. When you refer to "small amount," what do you mean percentagewise, 1%, one-half of 1%, or what?

A. Ordinarily, less than one-half of 1%.

X Q. 20. Then when the report was made up that Exhibit A to the original bill is taken from, what did it show, [fol. 493] did it show the amount that you had receipted for down here, or did it show a different and separate amount?

A. In gallons?

X Q. 21. Yes.

A. Exhibit A shows the gallons received at our terminal, not the amount shipped.

X Q. 22. What did the receipt on the bottom of United States Government bill of lading show, the amount received at the terminal or the amount actually shipped?

A. I am not positive. I would have to see one to refresh my recollection.

X Q. 23. You filled out several hundred of these a month, you and Mr. Stevens together?

A. Oh, no, six or seven a month. It was just on receipt of barges.

X Q. 24. Receipts in?

A. Yes sir.

X Q. 25. You filled out six or seven a month over a period of several years?

A. Yes sir.

X Q. 26. And you don't recall whether you receipted on the bottom for the amount that was actually received in your terminal, or whether you receipted on the bottom for the amount that was shown to be shipped?

A. I believe—but I am not positive—that we receipted for the amount that was shipped.

X Q. 27. How did you account for the difference between

the amount that you had receipted for here and the amount that you were actually able to deliver on the requisition [fol. 494] or order or whatever you might call it, from the Supply Officers?

A. The amount receipted for on the bill of lading was tonnage only for freight purposes.

X Q. 28. What do you mean by "tonnage", pounds?

A. Pounds, yes, not gallons.

X Q. 29. And you can't transpose from poundage to gallons in gasoline?

A. Oh, yes.

X Q. 30. Well, then, it was simply a matter of division to determine how many gallons from how many pounds, was it not?

A. That is right. The way I understand, I am not sure it is true, the gasoline was weighed or the gravity was taken on the gasoline and the weight figured, the exact weight of the gasoline was figured at the origin. We had no way of computing that weight at Memphis. Therefore, we took their records for it.

X Q. 31. What about the Air Corps Inspector, did he accept their records or did he check it for gallons?

A. He checked for gallonage.

X Q. 32. Did he make up a report on the number of gallons?

A. Yes sir.

X Q. 33. Did his report on the number of gallons correspond to the number of gallons that you have shown here on Exhibit A to the original bill?

A. Yes sir, it did.

X Q. 34. Now, on one of these shipments that had been diverted intransit, the bill of lading did not arrive with that? [fol. 495] A. No sir.

X Q. 35. You subsequently receipted on the bill of lading when you did get it?

A. Yes sir.

X Q. 36. What did you do then, mail that to the carrier, is that correct?

A. That is true, mailed it to the carrier.

X Q. 37. This gasoline that is under consideration here, the gasoline that is referred to in Exhibit A to the original bill, insofar as the State of Tennessee and its Inspectors

were concerned, that was inspected, sealed, handled in every manner just as any other gasoline that you received there at your terminal, was it not?

A. Yes sir.

X Q. 38. No difference at all?

A. No difference at all.

X Q. 39. You didn't receive gasoline there every day, did you?

A. No sir.

X Q. 40. Neither Government gasoline nor otherwise?

A. No sir.

X Q. 41. Look to your Exhibits 30, 31, 32; do you have them there?

A. Yes sir.

X Q. 42. "Pick-Up Service at Origin." Do you see that on the left hand side below "destination"?

A. Which one, either one?

X Q. 43. Any one of the three.

A. On the left hand side?

X Q. 44. Yes, coming down the left hand side, "Consignee, Destination, Route and Pick-up Service at Origin"?

A. Yes sir.

[fol. 496] X Q. 45. It "Was not by the Government," was the question?

A. Yes sir.

X Q. 46. Then it says, "Initials of Shipper's Authorized Agent or employee, C. E. S. ph." Do you know what that is?

A. C. E. S. is Mr. C. E. Stevens's initials. P. H. stands for Paul Hicks, the man that typed this bill of lading.

X Q. 47. And looking over to 32, that is "C. E. S." by someone else?

A. Yes sir.

X Q. 48. Mr. C. E. Stevens was the employee of the Standard Oil Company of Louisiana?

A. Yes sir.

X Q. 49. Was that the same thing done on all of these?

A. Yes sir, it was.

X Q. 50. You said these are exemplary?

A. Yes sir.

X Q. 51. Did you yourself actually make up these in-

ventory records for Standard Oil Company of Louisiana, or did someone else?

A. The majority of them I made up myself. Sometimes it required additional help. When I was busy doing something else, sometimes it required additional help.

XQ. 52. What were they made upon, a sheet of paper similar to this, a form sheet the company furnished?

A. A form that the company furnished.

XQ. 53. The Company still has those, do they not?

A. Yes sir.

[fol. 497] Further cross examination (Continued.)

By Mr. Dodson:

XQ. 1. During your direct examination you were asked whether or not Exhibit 33, the photostatic copy of a shipping notice, was exemplary of all other shipping notices that the company kept on gasoline where the destination was the Sub Depot there at Memphis, and your answer was that it was, is that correct?

A. That is a copy, yes sir.

XQ. 2. And you were asked whether or not you had made available here on the table to counsel all of those shipping notices, and your answer was "yes"?

A. For January, 1944?

XQ. 3. Yes.

A. Yes sir.

XQ. 4. This series of sheets that I hold in my hand, which purports to be originals with a manila folder on the outside designated, "Aviation Gasoline Furnished Armed Forces, January, 1944"; is that what you were referring to?

A. Yes sir, and those that are over there too. They came out of that folder.

XQ. 5. Does this contain all of the shipping notices on gasoline for the month of January, 1944, that is, aviation gasoline, that was delivered from your terminal for points of destination in Tennessee?

A. Tennessee, Arkansas, Missouri——

Mr. Green: Pin it down to Government gasoline.

[fol. 498] By Mr. Dodson:

X Q. 6. Aviation gasoline, Army. In other words, what I am asking you is this. This shows "Aviation Gasoline, Army, January, 1944"?

A. Yes sir.

X Q. 7. I believe you have removed from this book all shipping notices on gasoline that was going to points outside of the State of Tennessee, and have those in a separate and distinct stack?

A. Yes sir.

X Q. 8. Does this contain all of the shipping notices on gasoline under the designation, "Aviation gasoline, Army", that went out from your terminal at Memphis during the month of January, 1944, to points in the State of Tennessee?

A. I think it does.

X Q. 9. Mr. Sleeker, did you have anything to do with making reports to the State of Tennessee, Department of Finance and Taxation, with respect to gasoline received?

A. Only I verified the figures on the Inspector's report that he turned in to the Department of Finance and Taxation.

X Q. 10. What I am actually talking about is, the Standard Oil Company had to file a report once a month, did it not?

A. Oh, yes.

X Q. 11. Who made that report up?

A. That was made in the Division office.

X Q. 12. You had nothing to do with that?

A. No sir.

X Q. 13. I doubt if you ever saw it, did you?

A. No sir.

[fol. 499] Redirect examination.

By Mr. Waller:

R. Q. 1. Mr. Sleeker, you were asked by Mr. Dodson in connection with Complainant's Exhibits 30, 31, and 32, bills of lading relating to shipments to bases by common carrier trucks, as to the notation on the bill of lading, "Pick-up Service at Origin was not by the Government." What did that mean?

A. That just meant that who picked the load of gasoline up was not a Government owned truck or tank car.

R. Q. 2. In other words, if it was a common carrier truck, it was not a Government owned truck——

A. That is right.

Recross-examination.

By Mr. Dodson:

R. X Q. 1. And the same thing is true on Exhibits 15, 16 and 17, is it not?

A. Yes sir.

R. X Q. 2. And this says, "Pick-up Service at Origin was not by the Government", and the initials of the Shipper's Employee is "S. O. Co. of La." That is Standard Oil Company of Louisiana?

A. That is not in there, "Standard Oil Company of Louisiana"?

R. X Q. 3. Look to Exhibit No. 17?

A. Yes, that is typed in here, but it means the same [fol. 500] thing.

Further Deponent saith not.

T. G. Sleeker, by T. Roy Hix, Reporter.

Sworn to before me when taken, the 14th day of May, 1950. T. Roy Hix, Notary Public, State at Large. My commission expires April 6, 1954.

Deposition of J. M. Myrick

J. M. Myrick, the next witness, being first duly sworn, deposed as follows:

Direct examination.

By Mr. Waller:

Q. 1. Mr. Myrick, state your residence and occupation?

A. Residence, Raleigh, Tennessee, Rural Route 1 from Memphis. I am employed with the Esso Standard Oil Company in the Memphis Accounting Office.

Q. 2. How long have you been employed by that company and its predecessors?

A. Practically 35 years.

Q. 3. What is your position with the company?

A. At the present time I am head of the Stock Accounting Department.

Q. 4. What was your position with the company in January, 1944?

[fol. 501] A. Assistant Department Head.

Q. 5. Did you keep accounting records with reference to the Government owned aviation gasoline handled under the service contracts which have been referred to in this case?

A. Those records were prepared in the Department. I personally did not maintain them, but they were prepared under the supervision of the Department Head and myself.

Q. 6. Who was the Department Head at that time?

A. Mr. E. H. Gregory.

Q. 7. They were prepared under his supervision and your supervision, you say?

A. Jointly, yes sir.

Q. 8. Did you in your department also keep Stock Accounting records for company owned gasoline?

A. Yes sir.

Q. 9. Was there any difference in the method of keeping those accounting records, that is, as between company owned gasoline and Government owned gasoline?

A. Yes sir.

Q. 10. What was the difference?

A. The Army Aviation gasoline accounts were manually prepared, in that company accounts were prepared on the IBM System, and we couldn't co-mingle the two accounting records for the purpose of our accounting system.

Q. 11. It is in evidence that the personnel at the River Terminal furnished the Accounting Department out-turn tickets, showing the receipts of the Government owned gasoline. Were those tickets turned over to your Department?

[fol. 502] A. Yes sir.

Q. 12. And what other records were turned over to your

Department so that you could keep these accounting records?

A. Shipping notices of all disbursements on the aviation fuels.

Q. 13. Were those shipping notices the type of documents as the document filed as Complainant's Exhibit 33?

A. Yes, that is a typical shipping notice.

Q. 14. Mr. Myrick, you have seen on the table this large batch of shipping notices covering the month of January, 1944, have you not?

A. Yes sir, I am familiar with those.

Q. 15. Mr. Myrick, have these shipping notices for the month of January, 1944, been separated here on the table as between those covering shipments to points within the State of Tennessee, and those covering shipments to points outside of the State of Tennessee?

A. They have.

Q. 16. Do you have the total figures by gallons as to the quantities going to points within the State of Tennessee, and the gallons going to points without the State of Tennessee?

A. That is available.

Q. 17. Do you have the totals there?

A. We have the totals here of the quantities shipped outside the State by destinations, and that quantity is 1,065,832 gallons exported.

Q. 18. Is that the figure shown in Section 14 of the bill of complaint in this case?

[fol. 503] A. "To common carriers for transportation for the United States to points without the State of Tennessee." Those figures are correct for January, 1944.

Q. 19. That is the total gallonage going outside the State of Tennessee?

A. Yes sir.

Q. 20. Do you have that broken down to destinations?

A. Yes sir.

Q. 21. Will you read that into the record, the figures as to each destination for the month of January, 1944?

A. Grenada, Mississippi, 348,910 gallons; Walnut Ridge, Arkansas, 98,896 gallons; Newport Arkansas, 77,726 gallons; Courtland, Alabama, 11,580 gallons; Huntsville, Alabama, 20,210 gallons; Malden, Missouri, 12,566 gallons;

Columbus, Mississippi, 9,506 gallons; Greenwood, Mississippi, 16,814 gallons; West Helena, 3,650 gallons.

Q. 22. West Helena, what state?

A. Arkansas; Blytheville, Arkansas, 187,540 gallons; Little Rock, Arkansas, 208,164 gallons. Total quantity exported 1,005,832.

Q. 23. Mr. Myrick, are similar records available for subsequent months?

A. Yes sir.

Q. 24. Are shipping notices available for anybody that wants to break down destinations inside the State of Tennessee?

A. They are.

Q. 25. Mr. Myrick, if there are any other accounting figures that opposing Counsel want from the records, I take [fol. 504] it your office is prepared to get them up if it is not too burdensome?

A. That is correct.

Q. 26. Also, Mr. Myrick, those records are available to be checked by the State's auditors if they want to check them, are they not?

A. That is true.

Q. 27. I believe we asked you to get some figures that you have not gotten yet, not figures, but copies of the invoices that were rendered by the Standard Oil Company of Louisiana to the Government for performing these service contracts during the month of January, 1944. How many of those invoices were there?

A. I don't recall the exact number. Unfortunately those certified copies were not mailed with the supporting documents that came up overnight last night. All we had was the supporting documents. That certified copy of the invoice is available for review.

Q. 28. There were three service contracts in effect during the month of January, 1944, were there not?

A. Yes sir.

Q. 29. And there should be three invoices?

A. Yes sir.

Mr. Waller: I would like to reserve Complainant's Exhibit Nos. 36, 37 and 38 for those invoices. Copies will be furnished to opposing counsel.

(Documents referred to, to be supplied, marked Complainant's Exhibit Nos. 36, 37 and 38, and filed in evidence.)

[fol. 505] Cross examination.

By Mr. Cummings:

X Q. 1. Mr. Myrick, as the Accounting Witness for the Complainants in this case, what records do you have here that you are responsible for and which are you will to be responsible for, and what phases of the case do you purport to cover as an accounting witness?

A. The maintenance of Army aviation gasoline records, as they wanted us to prepare and maintain for them.

X Q. 2. Does that extend to inventories of the storage tanks at Memphis Terminal, for the month of January, 1944?

A. Our accounting period is on a monthly basis, not on a weekly or daily basis. We furnish the Government an opening inventory, receipts, disbursements, and closing inventory as the month ends, not on a daily basis. Daily inventory was prepared and furnished by Mr. Sleeker, direct to the Air Forces.

X Q. 3. I didn't have the benefit of hearing Mr. Sleeker's testimony, which is no excuse for me asking you this question, but are you prepared to give inventories for the month of January, 1944 in any form on records that you have?

A. I am.

X Q. 4. Will you please give us the benefit of those as they relate to the storage tanks——

A. Not by tank number, just by inventory grades.

X Q. 5. Would those inventories include only the storage tanks devoted solely to the storage of aviation gasoline for the Government in the month of January, 1944, at the Memphis Terminal?

[fol. 506] A. I want to correct that statement to this extent, that inventory data is available, but we do not have that record here. It is available by grade, not by individual tank numbers.

X Q. 6. All I am trying to find out is this. To what extent are you prepared to give any testimony as to inventories of Government aviation gasoline at your Memphis

Terminal during the month of January, 1944, and in what form can you give it, if any?

A. We can give you the——

XQ. 7. Can you give it?

A. I can get it. I can give you the inventory as of January 1, 1944; I can give you the receipts for that month, by grade; total disbursements by grade; total closing inventory as of January 31 by grade.

XQ. 8. Is there some other witness here who would be more familiar with that subject and who is better prepared to testify today about the matter than you?

A. I don't think so.

XQ. 9. All right, sire, will you give me those figures?

A. I can obtain those figures. They are not readily available here today.

XQ. 10. Will you please obtain and furnish for the record the figures that you have described in your previous answer?

A. I will.

XQ. 11. That will consist of, so that we won't misunderstand each other, the opening inventory for January, 1944, the receipts, the shipments, and the closing inventory?

A. That is correct.

[fol. 507] XQ. 12. Four different figures?

A. That is right.

XQ. 13. Two of which will be composite figures, of course?

A. That is right.

Mr. Waller: More than that, if you get them by grades.

Mr. Cummings:

XQ. 4. Are you going to break it down by grades?

A. Oh, yes.

XQ. 15. But you are not able to do that by tanks?

A. Not by tanks, no sir.

XQ. 16. There has been testimony in this record, Mr. Myrick, to the effect that your company kept in touch with Wright Field daily, or practically so, as to inventory, receipts, shipments and related matters. Do you know upon the basis of what accounting information the reports were

made by your company to Wright Field as to the Memphis Terminal?

A. As I mentioned earlier, our reports were on a full month's basis, not on any given daily or weekly basis. They maintained terminal records for the daily basis. Our records were only maintained for a full month's transaction.

X Q. 17. Were those terminal records ever made a part of or carried forward into your regular system of accounts?

A. No sir. Our records were based on the original documents that have been submitted here.

X Q. 18. I don't know whether you gave the figure for the intrastate shipments of aviation gasoline from Memphis Terminal to points in Tennessee, for the month of January, [fol. 508] 1944? Do you have that figure there where you can give it to me now, please sir?

A. I would have to be recapped from these documents here.

X Q. 19. Which documents are you referring to, so the record will show?

A. The documents that were not recapped individually as the export gallonage was. These are the shipping notices of the intrastate shipments.

X Q. 20. Is that a part of the record yet, the documents you hold in your hand?

A. This is typical of the documents that have been entered into the record.

X Q. 21. That is not an exhibit, the thing you have in your hand?

A. No.

X Q. 22. You did tabulate and give for the record the gallonage that was shipped from the Memphis Terminal to interstate points, on direct examination.

A. That is right.

X Q. 23. Have you or not tabulated the shipments from the Memphis Terminal for the similar period to Tennessee intrastate points?

A. Not in that form, but we have it in a composite form.

X Q. 24. I want the total figure, if you have it.

A. We have the composite. "At points within the State of Tennessee, 1,760,213 gallons." That is in the bill of complaint.

[fol. 509] X Q. 25. Is that for all grades of gasoline?

A. All grades of Army aviation gasoline.

X Q. 26. Can you give me, please sir, the gallonage of aviation gasoline that was transported by your company from the Memphis Terminal to the Memphis Airport during the month of January, 1944?

A. Memphis Air Force?

X Q. 27. Memphis Airport, or Memphis Sub Depot?

A. That figure is available from these documents here if and when we have time to make a recapitulation, as was done on export shipments.

X Q. 28. Will you furnish that figure for the record?

A. We can, and we will.

X Q. 29. What rate, if you know, per gallon or per pound, or however the rate was expressed under your contract with the United States Army Air Forces, or contracts, was charged for the transportation of aviation gasoline from the Memphis Terminal to the Memphis Airport?

A. I don't recall the figure, but as I remember it is in one of these service contracts. I don't recall it. I think it has already been entered into the testimony.

X Q. 30. Your solicitor handed you Exhibit No. 1, and referred you to the page which is open there.

A. $0.0105, on Type I deliveries. Type II and III deliveries, $0.0069.

X Q. 31. Are you familiar with Exhibit 1, Mr. Myrick?

A. Yes sir, reasonably so.

X Q. 32. I think I can conclude that part of the examina- [fol. 510] tion by asking if the rate is fully and adequately explained in the exhibit itself?

A. So far as I know, it is.

X Q. 33. Do you have anything to add to it or any knowledge or information about the rate that would add anything in the world to what is shown in this Exhibit 1?

A. I do not.

X Q. 34. Except as to the quantities or mileages involved in the transportation performed under that contract?

A. All I was interested in——

X Q. 35. Or related contracts?

A. All I was interest in was compiling quantities, gallons delivered.

X Q. 36. Were you responsible for the preparation of the

Tennessee Gasoline Tax Returns for January, 1944, or any subsequent period, up to and including June, 1946?

A. I was not.

X Q. 37. What witness would be the proper one to ask about those matters?

A. There is one here available.

X Q. 38. Do you know who he is?

A. Mr. Desaix, over there.

X Q. 39. To what extent did your accounting figures enter into and were reflected in the reports made by your company to the Tennessee Gasoline Tax Division, as to the gasoline tax for Tennessee?

A. The figures obtained from my Department were the basis of the tax rendition.

X Q. 40. What was Mr. Desaix's function, if you know, [fol. 511] with respect to the preparation of the Gasoline Tax Returns for January, 1944 for the State of Tennessee?

A. I am not familiar enough with his function to describe it.

X Q. 41. Do you know whether or not he had other accounting records in addition to the ones that were prepared and furnished by your office to him in making out that return?

A. I am not familiar with all of the records that he is required to make. I am familiar with the receipts portion that went into our accounting records, which was the basis.

X Q. 42. What information did you furnish to Mr. Desaix for the purpose of a gasoline tax return to the State of Tennessee for the month of January, 1944?

A. I gave him a list of the 60-degree gallons to the Terminal and other points, that were received from outside of the State of Tennessee into the State of Tennessee.

X Q. 43. Speaking specifically with reference to the gasoline, so far in the record it has been contended to be owned by the United States Army Air Forces or the United States Government, furnishing that information to Mr. Desaix as to that gasoline. Did you exclude for the purpose of that tax return the interstate gallonage of 1,005,832 gallons?

A. I didn't have anything to do towards that. Those fig-

ures were shown as exports from the State, as to the Government product.

X Q. 44. Did you separate, when you furnished Mr. Desaix [fol. 512] with this information, the export or interstate shipments from the Memphis Terminal, as related to the intrastate shipments from the Memphis Terminal, as related to the intrastate shipments in Tennessee, from the same terminal?

A. Those figures were all available from documents prepared in our Department, which he used in preparing such statement.

X Q. 45. Did you make any actual breakdown, for the purpose of the tax return on that particular subject, of interstate and intrastate shipments, or did you leave that to Mr. Desaix?

A. No, I didn't make any separation as to that.

X Q. 46. Did you furnish him with any original records, or did he have access to original records, if you know, from which he could have made that breakdown?

A. All accounting departments have access to company records or Government records for such use as is required in their assignments.

X Q. 47. Just what did you furnish Mr. Desaix with, what information?

A. Total quantity received into the State. Quantities are available from such records as are prepared in the Accounting Department and other departments as to where they went and in what quantities.

X Q. 48. The only figure then that you gave Mr. Desaix was the total receipts?

A. That is right.

X Q. 49. For the month of January, 1944, in the State of [fol. 513] Tennessee, from other sources?

A. They are readily available in our Department.

X Q. 50. Is that the only figure you gave him?

A. For the month of January, 1944?

X Q. 51. Yes.

A. So far as I know that was the only figure that was requested of me. I don't know whether he at any later date obtained such figures as you have asked about from documents maintained in my Department.

X Q. 52. You were one of the persons, one of the two persons in charge of that Department?

A. That is right.

X Q. 53. And you don't know whether Mr. Desaix came back into your Department and made a breakdown for the month of January, 1944 for Tennessee gasoline tax purposes, or not?

A. I would say this, if he did want such information and made the request, I would have had the figures available for him.

X Q. 54. You were there, weren't you, Mr. Myrick?

A. It is true I was there.

X Q. 55. Do you know whether he did or not?

A. I don't recall the minute details of everything that transpired in January, 1944.

X Q. 56. Is it customary for him to do a thing like that?

A. If he wants such information, it is customary to make a request of that and we would comply with such a request.

X Q. 57. Does he customarily want such information?

A. On Army aviation gasoline?

[fol. 514] X Q. 58. Yes sir, during this whole period that you were storing gasoline or handling through or in and out, or whatever you want to call it, for the Government, did he come in there and ask you for a breakdown, or did he come and make the breakdown himself, or did he make any breakdown?

A. I don't know whether he made a breakdown or not. We have made a breakdown here, and we maintain such a record.

X Q. 59. You didn't make any breakdown, did you?

A. It is here.

X Q. 60. Did you give that?

A. There was such a statement prepared showing where the product moved to.

X Q. 61. I thought you said the only figure you gave Mr. Desaix was total receipts?

A. We did give him total receipts, and we had also made a separation of where the product went to.

X Q. 62. At whose direction or for what accounting purpose did you make that breakdown, why did you make it?

A. On some request for such information.

XQ. 63 From whom?

A. From Mr. Desaix or the Army Air Forces or the United States Government. We were required to show where the product was consigned to.

XQ. 64. You mean Mr. Desaix, the United States Government, the Army Air Forces all wanted to know how much gasoline was being shipped from the Memphis Terminal to points inside the State, is that what you mean?

[fol. 515] A. The formula on which the manual records were prepared was on the basis of how the United States Army wanted their account analyzed, and it was required by destinations and therefore we designated the shipping notices that we prepared by destinations, and that was submitted to them on that basis.

XQ. 65. Was that done at Mr. Desaix's request or the Government's request or both?

A. Originally submitted on the Government's request.

XQ. 66. Did you ever see the tax return of the Standard Oil Company of Louisiana to the State of Tennessee for gasoline taxes for the month of January, 1944?

A. No sir.

XQ. 67. You were in no way responsible for it?

A. No sir, not for the return.

XQ. 68. The same thing would be true, I take it, with respect to returns of your company for the same month on gasoline other than Government owned gasoline, aviation gasoline?

A. That is right. I have nothing whatsoever to do with the compiling of the tax returns.

XQ. 69. These breakdowns that you have been testifying about as to interstate and intrastate shipments of aviation gasoline from the Memphis Terminal, I want you to be sure that you understand this question now, because to me it is important. Probably it is not important to Mr. Waller here, but it is to me. You made that breakdown for the use of the United States Government solely?

[fol. 516] A. For reconciling their Government bills of lading with quantities shown as disbursed for their accounts.

XQ. 70. And those breakdowns were not made for the purpose of use in the regular accounting system of the Standard Oil Company of Louisiana?

A. No, it was for the accounting of the Army aviation gasoline on a manual basis.

X Q. 71. And they were not carried forward, speaking of the breakdowns still into the regular set of books of the Standard Oil Company of Louisiana?

A. No, they did not in any way form a part of the Company's accounting system.

Redirect examination

By Mr. Waller:

R. X 1. Mr. Myrick, did the Standard Oil Company of Louisiana have to render a monthly invoice to the Government to collect the service charges under these contracts?

A. They did.

R. Q. 2. And did the Government require supporting papers for those invoices, a breakdown as to the destinations of the gasoline?

A. They did.

R. Q. 3. Was that the purpose for which you made the breakdown?

A. Yes sir.

R. Q. 4. Was that the only purpose?

A. The principal purpose was for their convenience.

[fol. 517] R. Q. 5. You had to do that to get your money?

A. That is right.

R. Q. 6. You have made some more breaking down in connection with this lawsuit, haven't you, Mr. Myrick, at the request of the lawyers?

A. Quite a bit. We have torn it forty ways from Sunday.

Recross examination.

By Mr. Cummings:

R. X Q. 1. Speaking of the forty directions, I have one further question, Mr. Myrick. These breakdowns didn't enter into any tax account of the Standard Oil Company of Louisiana, did they?

A. No sir.

R. X Q. 2. You were in charge of the books, the Accounting Department, is why you are able to say that?

A. That is right.

Further Deponent saith not.

J. M. Myrick, by T. Roy Hix, Reporter. (Seal.) Sworn to before me when taken, the 14th day of April, 1950. T. Roy Hix, Notary Public State at Large. My commission expires April 6, 1954.

[fol. 518] OFFERS IN EVIDENCE

Mr. Waller: The State has kindly furnished us, at our request on informal notice to produce, certain documents which are a part of the records of the Gasoline Tax and Inspection Division of the Department of Finance and Taxation. We would like to have them made a part of the record and given exhibit numbers as follows:

Exhibit 39—Monthly Gasoline Tax and Inspection Fee Report to the State of Tennessee, Department of Finance and Taxation, for the month of January, 1944, by Standard Oil Company of Louisiana, the report being complete with the exception that there has been excluded as immaterial OPA monthly gasoline rationing reports.

Exhibit 40—Inspector's Report, State of Tennessee, Gasoline Tax and Oil Inspection Division, on Form IF-4 (a), dated January 14, 1944, with 11 Form IF-4 (b), Inspectors' reports attached, and three Form IF-4 (c) Inspectors Reports attached.

Exhibit 41—Inspector's Report, State of Tennessee, Gasoline Tax and Oil Inspection Division, on Form IF-4 (a), dated January 18, 1944, with 5 IF-4 (b) and 1 IF-4 (c).

Exhibit 42—Inspector's Report, State of Tennessee, Gasoline Tax and Oil Inspection Division, on Form IF-4 (a), dated January 28, 1944, with 9 Form IF-4 (b) and 2 IF-4 (c).

Exhibit 43—Inspector's Report, State of Tennessee, Gasoline Tax and Oil Inspection Division, on Form IF-4 (a), dated February 5, 1944, with 14 IF-4 (b), and 16 IF-4 (c) attached.

[fol. 519] Exhibit 44—Two ledger sheets, the first one without a page number and the second one bearing Page No. 33, the first with the caption, "United States Government," and the second with the caption, "U. S. Gov.," both covering the month of January, 1944 coming from the

ledger relating to gasoline taxes maintained by the Department of Finance and Taxation.

We would like to adjourn our proof in chief at this time with the right to convene at a later date convenient to all parties, if we have other evidence. In the meantime, we would like to know whether or not there are any objections to any of these exhibits under the Best Evidence Rule, or otherwise, so that if there are, we can undertake to procure the best evidence. I hope we will be able to stipulate, because it is rather difficult at this late date to get original documents.

Mr. Cummings: For the record, Defendant objects to the receipt in evidence of Exhibit No. 25, upon the ground that there is a discrepancy on the face of the exhibit.

. . . The following tabulation has been furnished by the witness, J. M. Myrick, as requested by Counsel for the defendant, X Q. 10-X Q. 15:

[fol. 520] Stock Summary of Government-owned Aviation Gasoline at Memphis, Tennessee

Month of January, 1944

(Expressed in Gallons)

	Grade 87	Grade 91	Grade 130	Total
Quantity on hand at beginning of Month	None	1,398,506	371,448	1,769,954
Barge Receipts	995,082	1,048,161	790,744	2,833,987
Deliveries to U. S. Army Air Bases per Requisitions by Supply Officers	238,183	1,550,327	948,199	2,736,708
Quantity on Hand at Close of Month	760,715	896,662	213,573	1,874,950

[fols. 521-522] It is stipulated that J. M. Myrick, if recalled, would testify that the allegation in Section XIV of the original bill that 1,760,213 gallons of gasoline were delivered to the United States at points within the State of Tennessee was in error and that this figure should have been 1,759,230 gallons,—the last named figure representing the gallonage on which complainant's billings to the United

States for the month of January, 1944, were made as shown in Complainant's Exhibit Nos. 36, 37 and 38. The gallonage figure contained in the original bill improperly included 933 gallons delivered from Tri-Cities Airport during November and December, 1943, but not billed until January, 1944, and the discrepancy of 10 gallons, which is evident from a comparison of the figures above set forth, resulted from an illegible figure in the accounting record which was examined at the time of the preparation of the original bill.

[fols. 523-524] STIPULATION RE DEPOSITIONS

The depositions of John P. Knight and Cicero C. Sessions, taken by consent, before Ferdinand E. Zimmer, a Notary Public in and for the Parish of Orleans, State of Louisiana, in the Boardroom of the Louisiana Bank & Trust Company, New Orleans, Louisiana, beginning on June 9, 1950, at 9:30 a. m.; said depositions to be read as evidence on behalf of the Complainant and the Intervenor in the above-styled cause.

[fol. 525] All formalities as to notice, caption and certificate are waived. All objections are reserved to the hearing, except objections based upon the best evidence rule or the form of the question.

It is agreed that the Court Reporter, being a Notary Public, may swear the witnesses and subscribe their names to the depositions when transcribed.

OFFER IN EVIDENCE

Mr. Waller: Before commencing the examination of Mr. Knight, I would like to have filed as Complainant's Exhibit 45, a certified copy of Army Regulation No. 55-155, calling particular attention to Paragraph 41 (2) of those regulations, which prescribe the notation appearing on Complainant's Exhibit 25. I have furnished you a copy, Mr. Dodson. Is there any objection?

Mr. Dobson: Let the record show there is no objection from the standpoint of best evidence. Other objections are reserved to the hearing.

DEPOSITION OF JOHN P. KNIGHT—Filed October 30, 1950

John P. Knight, Being first duly sworn as a witness by Ferdinand E. Zimmer, Notary Public, testified as follows:

[fol. 526] Direct examination.

By Mr. Waller:

Q. 1. Mr. Knight, will you state your residence, age and present occupation?

A. My residence is in Pittsburgh, Pennsylvania. I am Assistant General Sales Manager for the Gulf Oil Corporation and the Gulf Companies; age forty-four.

Q. 2. Did you have a former connection with the Army Air Force during the war, and, if so, what was it?

A. Yes, I did. During most of the war, I was in the legal branch of the Procurement Division of what was, at the start of the war, the Material Command and later became the Air Technical Service Command.

Q. 3. Where were you stationed?

A. I was stationed approximately two years and a half in Wright Field, Dayton, Ohio.

Q. 4. What was your rank?

A. Major.

Q. 5. What were your duties and responsibilities?

A. From the latter part of 1942, I was chief of the unit in the Legal Branch that was charged with the preparation of contracts covering the procurement of petroleum products and services in connection with the handling of petroleum products.

Q. 6. I believe, Mr. Knight, in preparing for your testimony, you have examined these exhibits which I will now hand to you——

Mr. Dodson: Are these the exhibits that are already in [fol. 527] evidence and identified?

Mr. Waller: Yes, Complainant's Exhibits 1 to 7 inclusive, Complainant's Exhibit 35, and Defendant's Exhibit 1.

A. Yes.

Q. 7. What connection and responsibility did you have in connection with those contracts?

A. Complainant's Exhibits 1 to 7 were prepared under my supervision by officers or civilians under my direction.

Q. 8. Do they each indicate an initial, showing the identity of the person who actually prepared the contract?

A. Yes, the cover of each shows the identity of the person who actually wrote the contract.

Q. 9. I wish you would go through those contracts, state the initials appearing, and what person bore those initials.

A. Complainant's Exhibit 1 bears the initials "N. B." That was written by Captain Norman Bierman, a lawyer now practicing in St. Louis, Missouri.

Complainant's Exhibit 2 bears the initials "W. L. B." That was written by Lieutenant William L. Broad, an attorney now practicing in Syracuse, N. Y.

Complainant's Exhibit 3 bears the initials "R. J. F.", which was prepared by Lieutenant Richard J. Farrell, an attorney in the Law Department of the Pan American Petroleum & Transport Company, New York City.

Complainant's Exhibit 4 bears the initials "J. P. K.", which are my own initials, indicating that I prepared the contract.

Complainant's Exhibit 5 bears the initials "G. S. T.", indicating that this contract was written by Mr. George S. [fol. 528] Thomas, who is currently a civilian lawyer at Wright Field, Dayton, Ohio.

Complainant's Exhibit 6 bears the initials "R. E. B.", indicating this contract was prepared by Captain Ralph E. Boggess, who is with the Legal Department of the Phillips Petroleum Company, and is now practicing law in Oklahoma City.

Complainant's Exhibit 7 bears the initials "R. J. F.", indicating that it was prepared by Lieutenant Richard J. Farrell, whom I identified in connection with one of the previous exhibits.

Q. 10. What about Defendant's Exhibit 1?

A. Defendant's Exhibit 1 bears the initials "R. J. F.", indicating it was written by Lieutenant Richard J. Farrell, who has previously been identified.

Q. 11. What about Complainant's Exhibit 35?

A. Complainant's Exhibit 35 does not bear any initials. I am unable to identify the specific person who wrote the

contract. However, it was one of the petroleum contracts that was prepared under my supervision.

Q. 12. Complainant's Exhibit 35, I believe, covers the year 1943; that is, the contract with the supplements, does it not?

A. That's right; it is dated June 9, 1943. Its effective date, however, was January 1, 1943.

Q. 13. When that contract was executed, and I am referring to Complainant's Exhibit 35, was it a part of your duty to consider, and did you consider and pass upon, the question of the applicability or non-applicability of the [fol. 529] Tennessee gasoline tax and inspection fee statutes?

A. It was a part of my duty at that time, and I did pass upon it at the time in the preparation of this contract.

Q. 14. What opinion did you form?

A. I held the opinion that the Tennessee State Gasoline Tax was not applicable to gasoline being handled by the contractor for the Government under this contract.

Q. 15. You mentioned the Tennessee Gasoline Tax Statute. Do you include——

A. —the inspection fee as well, yes.

Q. 16. Are you a lawyer by profession, Mr. Knight?

A. I am.

Q. 17. Where did you graduate?

A. From Western Reserve Law School, Western Reserve University Law School, Cleveland.

Q. 18. And did you practice law in Cleveland, Ohio?

A. I did, for approximately eleven years.

Q. 19. Do you recall whether or not, in the latter part of 1943, you received any information or heard about a conference in Nashville between representatives of the Government, including Major Cicero Sessions, with representatives of the State of Tennessee, concerning the State's attitude as to the applicability or non-applicability of the Tennessee Gasoline Tax and inspection fee laws to government-owned gasoline purchased by the Government outside the State of Tennessee?

A. I did hear of such a conference in 1943, in connection with day-in and day-out discussions which I had with the [fol. 530] Judge Advocate General's Department at Wright Field.

Q. 20. What was the State's attitude on this question, according to the information you received?

A. We were watching the situation rather closely and the State had made no effort to collect the state gasoline tax or the inspection fee on government-owned gasoline being handled in Tennessee by contractors of the Government.

Q. 21. My specific question was with reference to this conference that you heard about, and as to what the attitude of the state officials was as expressed in that conference, according to the information you received about the conference.

A. It was my understanding that the state officials had expressed themselves as believing that the government-owned gasoline being handled in Tennessee was not subject to the state tax, and that the State would not attempt to assess the tax or the inspection fee.

Q. 22. Then, I believe you stated that you also had information that, as a matter of fact and as a matter of practice, the State had not made any claim for any tax on this gasoline?

A. That is correct.

Q. 23. And I am referring specifically, of course, to the gasoline handled under the contract which has been identified as Complainant's Exhibit 35.

A. That is correct.

Q. 24. When the contracts relating to the year 1944 and subsequent years were entered into, Complainant's Exhibits 1 to 7 inclusive, did you know and rely upon the fact [fol. 531] that the State had not claimed gasoline taxes or inspection fees on the gasoline handled pursuant to the contract filed as Complainant's Exhibit 35?

A. Yes, I did. I knew that and I relied upon that in the preparation of the contract which was prepared for the year 1944 and later years, covering the handling of government-owned gasoline by the Standard Oil Company of Louisiana in Tennessee.

Q. 25. If the State of Tennessee had made any claim for gasoline taxes or inspection fees on the gasoline handled pursuant to Complainant's Exhibit 35, would the subsequent agreements, Complainant's Exhibits 1 to 7, have been approved?

A. No, they would not have been approved. If we had felt that the State of Tennessee intended to claim applicability of the State gasoline tax, we would not have entered into the contracts, which are Complainant's Exhibits 1 through 7, which cover 1944 and subsequent years.

Q. 26. Mr. Knight, these contracts to which you have referred have been variously referred to in this record as service contracts, lease contracts, and through-put contracts, and I believe one witness said he used the term "lease" in connection with those contracts. Do you have any comment on that terminology?

A. I think, with those who were not closely associated during the war with the type of contracts that were used in connection with petroleum products, there may have been some misunderstanding as to what was meant by various words. In fact, there were only two types of con-[fol. 532] tracts which were used during the war in connection with petroleum. One was a so-called "fixed-price supply contract", which was employed to purchase petroleum products. The other type was a "fixed-price service contract", which was employed to procure services of a contractor in connection with the handling of petroleum products. The services so procured might consist of any number of variety of different services, including among them water or land transportation, handling the terminaling of gasoline, or possibly putting the gasoline in the government aircraft at a specified airport.

Q. 27. And you call them all—that is, the different contracts other than supply contracts—you call them all service contracts?

A. The contracts marked Complainant's Exhibits 1 through 7, Defendant's Exhibit 1 and Complainant's Exhibit 35, are all service contracts.

Q. 28. You referred to supply contracts. Will you look at Complainant's Exhibit 12, and state if that is what you refer to as a supply contract?

A. Complainant's Exhibit 12 is a contract with the Standard Oil Company of Louisiana, and is what I refer to as a supply contract, in that it covers the purchase of petroleum products, as distinguished from the purchase of services.

Q. 29. What initials are on that contract?

A. This contract, Complainant's Exhibit 12, bears my initials, "J. P. K".

Q. 30. And you prepared personally that contract?

[fol. 533] A. I personally prepared this contract.

Q. 31. I would like to ask you to look at Complainant's Exhibit 34, and see if you knew anything about that contract at the time it was executed, as being a lease by the Lion Oil Company to the Standard Oil Company of Louisiana of certain facilities at Memphis?

A. I knew that this lease was in existence. However, I do not recall that I saw the lease at the time, but I have seen it before.

Q. 32. Did you go to Memphis at any time in connection with that Lion arrangement, or for any other purpose?

A. Yes, I did. As I recall it, it was early in 1944 that I, accompanied by Lieutenant (later Captain) Dean Sweeney, whose name appears on most of those contracts as the contracting officer, went to Memphis, Tennessee for the purpose of inspecting the terminaling facilities that we were employing under the service contracts, and to confer with the Standard of Louisiana concerning those facilities, and also concerning the adjacent storage facilities of the Lion Oil Company which were leased by Standard of Louisiana.

Mr. Waller: You may cross examine.

Mr. Dodson: Mr. Reporter, let the record show that a number of the questions that have been asked this witness will be objected to at the hearing, in accordance with the agreement under which the depositions are being taken, and that we desire to cross examine this witness about some of those matters without in any way waiving the objections which we will make.

[fol. 534] Cross-examination.

By Mr. Dodson:

XQ. 1. Mr. Knight, did you come to Nashville, Tennessee at any time to discuss with the officials of Tennessee the applicability of our gasoline tax and inspection fees in connection with those contracts?

A. No sir, I did not.

XQ. 2. Did you at any time discuss that with the officials of Tennessee anywhere?

A. No, I did not.

XQ. 3. Who did discuss it with the officials of Tennessee, according to your information?

A. According to my information, Major Cicero Sessions had such a discussion.

XQ. 4. And with whom did he discuss it, do you know?

A. I believe with Mr. Weakley and possibly others.

XQ. 5. Did he discuss it with Mr. Cletus Green, or do you know?

A. I don't know.

XQ. 6. In any event, you don't recall hearing that name mentioned?

A. I don't recall hearing that name, no.

XQ. 7. In any event, all of these contracts that you refer to as service contracts, being Complainant's Exhibits 1 through 7, and Complainant's Exhibit 35, did contain a reimbursement clause, did they not?

A. That is correct.

XQ. 8. Who advised you of this conference between Mr. [fol. 535] Sessions and the different officials?

A. The Judge Advocate General's Office at Material Command of Wright Field.

XQ. 9. And when were you advised of that, do you recall?

A. I believe it was in the fall of 1943.

XQ. 10. You have referred to two different types of contracts. I believe you referred to one as the fixed price supply contract or purchase contract——

A. Supply contract.

XQ. 11. And the other as fixed price service contract?

A. That is correct.

XQ. 12. Did you have any fixed price supply contracts, under the terms of which the refiner or producer of petroleum products was to furnish those to the Government at the point where they were actually to be used?

A. There were a few such contracts, covering delivery or the purchase of petroleum products at various flying schools around the country, covering the low octane aviation gasoline. By that, I mean eighty-seven octane or below. There were no such contracts as you described in connection with ninety-one octane or one hundred octane.

XQ. 13. You did have fixed price supply contracts with

Standard of Louisiana, now the Esso Standard Oil Company, for the purchase by the Government of some of the—as you refer to them—low octane gasolines, did you now?

A. I don't recall specifically, but it would be reasonable to answer yes, that we did have such a contract.

[fol. 536] X Q. 14. Now, what about these fixed price supply contracts on the low octane gasoline, where there was actually to be delivery made to the flying school? Did you have any of those with Standard of Louisiana, now the Esso Standard?

A. It is possible that we did.

X Q. 15. Was there any difference in the cost to the Government, or the total cost to the Government, depending upon the way that it was handled?

A. You mean by your question, was there a difference in the unit cost per gallon of gasoline?

X Q. 16. Yes.

A. Depending upon the location at which the purchase was made?

X Q. 17. No sir, depending upon the type of contract under which it was made, taking into consideration your additional transportation costs?

A. Yes, the purchase of gasoline at points away from the point of manufacture, the purchase price included whatever transportation or whatever cost the contractor had in moving the gasoline from the point of manufacture to the point of purchase.

X Q. 18. Now, my question is—and let me rephrase it and get at it this way: What I am attempting to find out is, did the Government save any money by using one type of contract or the other type of contract? What I mean by the question is this: Assuming that you had one of the flying schools, that you obtained gasoline in two ways for those flying schools. One would be under a fixed price [fol. 537] supply contract and various fixed price service contracts; that's correct, is it now?

A. Yes, that is correct.

X Q. 19. Now, would there be any saving to the Government by using one type of contract or the other?

A. The policy decision was made early in 1943, that now only would there be possibly a slight saving in purchasing

gasoline at the point of manufacture, and then have the Government move it and have it handled by the Government, by also the system of procurement of the volume products, and by the volume products I mean ninety-one octane and one hundred octane. That could only be handled in connection with the entire war program, by procuring those products at the refinery and moving those products under Government bills of lading and procuring the services of contractors to store and handle and possibly in some cases deliver the products.

To answer your question specifically, I think there was some saving in that, in the over-all, by procuring and having the Government move its own gasoline from the point of manufacture to the point of use; and, of course, there would be the added feature of the control of such gasoline program by that means.

X Q. 20. Well, in part it was brought about by taking advantage of rail rates, which were available to the Government in some areas; in other words, where you procured services, not of transportation, but of terminaling the products. You were buying just simply one service as [fol. 538] such, rather than buying a product, the price of which included that service, where you did not have as intimate control of the elements of the price as you would when you were simply buying a service rather than a product which included many services.

X Q. 21. Being in the Legal Branch of the Procurement Division, were you familiar with the mechanics by which the procurement of gasoline, this high octane gasoline, that the Government was procuring, and the actual allocation of that gasoline, was determined?

A. In a general way, I was familiar with it.

X Q. 22. Referring specifically to terminaling facilities, as you refer to them, I believe the Procurement Division, or some branch of the Procurement Division at Wright Field, obtained daily reports from the terminals, as to the inventory on hand at the beginning of the day, the amount received during the day, and the inventory on hand at the end of the day; is that correct?

A. That is correct. A Supply Division of what was then the Air Service Command procured such reports.

XQ. 23. They were on regular Government forms, I presume, were they not?

A. They were on standard forms, yes.

XQ. 24. And they constitute a part of the records today of the Federal Government, do they not, in one of its various branches?

A. Yes.

XQ. 25. That's all.

[fol. 539] Redirect examination.

By Mr. Waller:

RDQ. 1. Mr. Knight, you were asked whether or not, in some instances, the Government may have procured gasoline at the point of use and taken title to the gasoline at point of use rather than at the refinery.

Mr. Dodson: I am excepting to the form of that question, because of the inclusion of the words "taken title at the point of use." I believe that language did not appear in my question, and would be objectionable in a question because of the inclusion.

Mr. Waller:

RDQ. 2. Well, my question is simply this: I was simply leading up to what I wanted to ask you with respect to the contracts which are filed as Complainant's Exhibits 1 to 7 in this case. Where did the Government take title to the gasoline, inside or outside the State of Tennessee?

A. Title to the gasoline that was handled by the Standard Oil Company of Louisiana under Complainant's Exhibits 1 through 7, was taken by the Government at the point of manufacture, and the gasoline was then moved by the Government into the State of Tennessee and stored by the Standard Oil Company of Louisiana under a service contract.

Mr. Dodson: At the time of the taking of the original deposition in this cause, it was agreed that the Defendant's objections made to that question or to that form of question would be considered as made throughout the hearing. [fol. 540] We want to note that, unless there is some objec-

tion, that same agreement still stands, so I won't have to keep objecting.

Mr. Waller:

R D Q. 3. With reference to the reports that may have been made by the contractor at Wright Field, as to inventories and so forth, and as to the records that were kept, was that under your immediate supervision?

A. It was not, no.

R D Q. 4. And do you actually know whether written reports were made daily, or whether informal reports were made daily?

A. My knowledge of that goes to the original preparation of this contract, which had a provision in it for the submission of reports. Those reports were not submitted to me and were not kept under my supervision. I do not know exactly the form of those reports, or that they were made as set out in the contract. There was, however, a method of stock control which was used.

R D Q. 5. And reports at some intervals, whether daily or not, were made?

A. That's right.

R D Q. 6. That's all.

Recross examination.

By Mr. Dodson:

R X Q. 1. Mr. Knight, didn't you on occasion see some of those reports, maybe unofficially, but didn't you see some of the reports?

A. I don't recall that I ever saw any.

[fol. 541] R X Q. 2. Well, then, why did you, in response to my question, state that there were such reports, that they were made on Government forms, and that they still constitute part of the files of the Federal Government?

A. There was a method of stock control, as I explained. The contract required reports to be made at certain intervals.

R X Q. 3. At what intervals?

A. May I refer to the contract?

R X Q. 4. Sure.

A. Complainant's Exhibit 4 specifies "to render reports at the close of the business day, except Saturday, by telegraph or telephone, at the expense of the Government," setting out certain information which had to do with the quantity of gasoline on hand and the quantity received and so on. As to just how those were made or how they were kept, or the forms on which they were submitted, I am not certain. I am not qualified to answer that question definitely.

R X Q. 5. Let me ask you a question that I tried to ask awhile ago another way, to see if you and I understand each other on it, because I am not too familiar with technical gasoline handling. How did the cost to the Government on this gasoline that was being procured compare to gasoline which was purchased from Standard Oil Company at Baton Rouge, Louisiana, transported, stored and distributed under these various service contracts—how did it compare with Standard Oil Company's delivery price?

A. That is a difficult question to answer. I can only an- [fol. 542] swer that in a rather lengthy way, I am afraid, by saying that we did not buy from Standard of Louisiana in Tennessee any one-hundred octane or ninety-one octane gasoline, which was the gasoline handled by Standard of Louisiana for the Government on a service basis under these contracts; so there isn't any fair basis on which I could appraise the difference in costs, in answer to your question.

R X Q. 6. Well, did you not purchase that gasoline at other places than in Tennessee?

A. We may have purchased—I say "may have", I don't recall positively—we may have purchased some of the lower octane gasoline from Standard of Louisiana at points away from its refineries in other areas. However, in the case of the gasoline, because of the different delivery location where title was taken by the Government, and the different octane grade, it would be a different price at the refinery, to start with, and consequently you cannot compare that with the cost to the Government of gasoline which eventually arrived in Tennessee, being moved by the Government on Government bills of lading and handled under service contracts.

R X Q. 7. No sir, my last question didn't mean a com-

parison of those two. As I understand it, no one-hundred octane gasoline and no ninety-one octane gasoline was purchased under a contract where the refiner delivered it to the Government at the point of use; is that correct?

A. That's right, it was all purchased at the point of manufacture.

R X Q. 8. Now, it was only with respect to eighty-seven or lower octane, if there is such, of gasoline that you used two systems?

[fol. 543] A. That's right.

R X Q. 9. Now, did you not have some locations, some training fields, where you purchased gasoline under both systems from the same company, Standard Oil Company?

A. It is possible, but I would doubt it.

R X Q. 10. Who would know definitely about that, Mr. Knight, do you know? I mean, under whose particular supervision or field of endeavor would that be—or would it have been?

A. That would have been the responsibility and within the knowledge, in my opinion, of the people in the fuel section of the Supply Division. Some of those people testified earlier, I understand.

R X Q. 11. Certainly it would be within the knowledge of the officials of the Standard Oil Company, or some of them?

A. That would be difficult for me to say, what they would know about it or would remember about it.

R X Q. 12. That's all.

Redirect examination.

By Mr. Waller:

R D Q. 7. Mr. Knight, going back to the daily report matter that Mr. Dodson asked you about, I think this is obvious, but I will ask you for the record: A telephone communication from Memphis to Wright Field would necessarily not be made on a Government form; is that correct?

A. A telephone communication, no, would not be made on a Government form.

R D Q. 8. And telephone communications were in com-

[fol. 544] pliance with the contracts?

A. That's right, telephone communication was permitted under the contract.

Recross examination.

By Mr. Dodson:

R X Q. 13. When such telephone communications were received respecting a matter of such importance, wasn't there a formal report made in the office of the receiving officer that they had received such telephone communication?

A. I presume that they wrote down the information that they got; just how, I don't know, because that was in another division of the Command and was not my responsibility.

R X Q. 14. Wasn't it standard operating procedure throughout the service, though, that you were supposed to write down whatever information you received, and make a record of it?

A. Generally speaking, that was true.

Mr. Waller:

R D Q. 9. Was it standard procedure for the Government to permanently keep all informal records of that kind?

A. I judge it would not be. They would be so voluminous that I don't think they would be kept.

John P. Knight, by F. Zimmer.

Sworn to before me at New Orleans, Louisiana on the ninth day of June, 1950. Ferdinand Zimmer.

[fol. 545] Deposition of Cicero C. Sessions—Filed October 30, 1950

Cicero C. Sessions, being first duly sworn as a witness by Ferdinand E. Zimmer, Notary Public, testified as follows:

Direct examination.

By Mr. Green:

A. 1. State your name, age and occupation.

A. Cicero C. Sessions, Attorney at Law, 41 years of age.

Q. 2. Where do you practice?

A. New Orleans, Louisiana.

Q. 3. You are a member of the firm of Montgomery, Fenner, & Brown?

A. I am.

Q. 4. Prior to that association, where were you employed?

A. For a brief period of time after the war, I was an assistant city attorney of the City of New Orleans.

Q. 5. And prior to that?

A. I was in the Army of the United States.

Q. 6. And prior to your entry into the Army, where were you employed?

A. From about May, 1940 until January 27, 1942, I was one of the assistant attorneys general of the State of Louisiana, and chief counsel of the Louisiana Department of Revenue. Prior to that I practiced law.

Q. 7. Where were — on duty as a commissioned officer in [fol. 546] the Army of the United States?

A. I initially was on duty at Fort McClellan, Alabama, and Fort Benning, Georgia, and on June 13, 1942, I reported for duty in the office of the Judge Advocate General of the Army in Washington, I remained on duty in the Tax Division of that office until April, 1944, and then I attended a course of instruction at the Commanding General's Staff School, Fort Leavenworth, Kansas. After that I attended a course of instruction at the Judge Advocate General's School at Ann Arbor, Michigan, the University of Michigan, after which I went overseas to the Mediterranean branch office of the Judge Advocate General's Office. Do you want all of my successive assignments?

Q. 8. That's enough. While on duty in the Tax Division of the Judge Advocate General's Office of the War Department, to distinguish it from the Judge Advocate General's Office in other fields, did you have occasion to consider the question of the application of the Tennessee Gasoline Tax and Inspection fee statutes to Government-owned gasoline?

A. I did.

Q. 9. Who assigned that duty to you?

A. The Chief of the Division, Colonel [illegible]erryman Green.

Q. 10. Did you discuss that question with authorities of the State of Tennessee?

A. I did.

Q. 11. Do you recall when that discussion was had?

A. That discussion was had in the month of September, 1943.

[fol. 547] Q. 12. Can you state who was present at that conference? Representing the State of Tennessee?

A. There were several conferences. The people who represented the War Department, besides myself, were Major John H. Hendren, a Judge Advocate Officer who was assigned to duty in the Office of the Chief of Engineers, and Captain Joseph P. McNamara, also a Judge Advocate Officer assigned to duty in the Office of the Chief of Ordnance, who represented that office in the conference.

The principal representatives of the State of Tennessee who participated in the conference were W. F. Barry, Jr., Solicitor General of the State of Tennessee; Mr. Harry Phillips, an Assistant Attorney General of the State of Tennessee; Mr. George F. McCanless, Commissioner of Finance and Taxation of the State of Tennessee; Mr. D. R. Henley, Assistant Commissioner of Finance and Taxation of the State of Tennessee; and Mr. R. L. Weakley, Director of the Gasoline Tax and Oil Inspection Division in the Department of Finance and Taxation of the State of Tennessee.

Now, there may have been one or two of Mr. Weakley's clerks who furnished information or sat in on the conference, but the people who actually participated and took decisions as to the matters that were under discussion were those that I have named.

Q. 13. I ask you if you recall specifically a conference with the gentlemen you have just mentioned, on the ninth of September, 1943?

A. I do.

[fol. 548] Q. 14. At that conference, what was discussed and what conclusion was reached, if any?

A. There was under discussion the question of the taxability by the State of Tennessee, under its gasoline tax and inspection fee laws, of Government-owned gasoline, the titles of which had been taken by the United States outside the State of Tennessee. There was considerable interest on the part of the Tennessee representatives of the facts involved, concerning the purchases made by the Government, where they were made, and various other actual facts

that seemed to be somewhat obscure in some respects in their minds; and then there were discussions of the actual provisions of the Tennessee law, and the effect of it, as to this gasoline, and the conclusion was reached that the gasoline was not taxable by the State of Tennessee.

There was also discussed the question of toluene, ether and similar products used in the manufacture of explosives. There were ordnance plants manufacturing explosives in the State of Tennessee, and certain of those products might have been within the ambit of the Tennessee Tax and Inspection laws. The same conclusion was reached as to those products as was reached as to gasoline.

Q. 15. Did you make an official report to your superiors in the Judge Advocate General's Department of that conference?

A. I did.

Q. 16. In what form did you make that report?

A. A written memorandum for the Judge Advocate General, dated 14 September 1943, signed by me.

[fol. 549] Q. 17. I hand you a photostat of what appears to be a report or memorandum for the Judge Advocate General's Department, through the Acting Chief of the Tax Division, and ask you to look at that photostat and state whether or not that is a copy or photostatic reproduction of your report?

A. That is a photostatic reproduction of the original report.

Q. 18. I ask you to look at the photostat and identify, if you will, the initials which appear on that photostat.

A. In the upper right-hand corner appear the initials "B. G." which are the initials of Berryman Green. I think your rank then was Lieutenant Colonel, and you were Acting Chief of the Tax Division.

Under the initials, "B. G." and "F. W. L.", which I recognize to be in the handwriting of Brigadier General Fred W. Lewellyn, who at that time was Assistant Judge Advocate General in the Judge Advocate General's office.

At the bottom of the first page of the report, I observe "Noted—M. C. C.". I recognize that notation as being in the handwriting of Major General Myron C. Cramer, at that time the Judge Advocate General of the Army.

Mr. Green: The photostat just identified has been offered in evidence, marked Complainant's Exhibit 46.

A. 19. In this conference of September, 1943, who represented the Air Force?

A. I did. As a matter of fact, I represented all of the Services that might have any interest, so far as the War [fol. 550] Department was concerned. No one came down specifically to represent the Air Forces. Major Hendren and Captain McNamara were there because their offices were also specifically directly interested.

Q. 20. Do you know whether the result of that conference was ever reported to the Technical Service of the Air Force?

A. It was, in accordance with usual routine in matters of that kind.

Q. 21. Did you at any time subsequent to September 14, while in the discharge of your duties, and having to do with the Tennessee gasoline tax and inspection fee statutes, ever hear of the State of Tennessee, or anyone on behalf of the State of Tennessee, asserting a claim that Government-owned gasoline in Tennessee was subject to taxation in the State of Tennessee?

A. No, I had quite a bit of business with the tax authorities of the State of Tennessee subsequent to September, 1943, and had at least two additional conferences in Nashville regarding other tax matters, and at no time subsequent to September 14, 1943 did it ever come to my attention that any such action was contemplated, or any such position taken, by any taxing authority or any legal authority representing the State of Tennessee.

Mr. Green: All right, that's all.

Cross examination.

By Mr. Dodson:

X Q. 1. Mr. Sessions, this letter of September 14, 1943, defined the scope of the conference with the State of Tennessee officials whom you set out were present, did it not? [fol. 551] A. Oh, it speaks for itself, Mr. Dodson. It was only a report on the general subject. It did not go into the minutia of the conferences. There were matters discussed

in the conference—in the various conferences that were held—they weren't all held on one day—that were ancillary to and connected with the general subject matter. The general subject matter that I had to report to the Judge Advocate General was the question of the applicability of Tennessee Gasoline Tax laws and inspection fee laws to Government-owned gasoline.

XQ. 2. I want to ask you to refer to this exhibit then, and see if it does not recite that "the subject of the conference was the taxation by the State of Tennessee, under its gasoline tax and inspection fee laws of"—then naming the subjects—"[illegible]d by War Department contractors operating Chickasaw Ordnance Works and Holston Ordnance Works"?

A. I see those words there, but I see other words also.

XQ. 3. All right, sir. Did you at any time subsequent to September 14, 1943, the date of this letter, which was subsequent to the conference which you had, discuss with the various officials of the State of Tennessee, whom you have named, or any of them, the subject of Tennessee gasoline taxes?

A. No, I don't think so, although when——

XQ. 4. Before you finish your answer, let me amend it and add, "or inspection fees".

A. I don't think so, but, when I had a subsequent conference with General Barry and Mr. McCanless and several [fol. 552] other people—by that time, Harry Phillips was in the Navy and no longer in Nashville—relative to certain privilege taxes at Oak Ridge, there may have been some incidental mention of gasoline taxes, but I don't specifically recall that, because there was no doubt in our minds, and no doubt in the minds of the officials that we talked to, subsequent to September 14, 1943, so far as I took it, that the question had been resolved and that we had a decision of interpretation, the contemporaneous construction by the administrators and the highest legal authorities in the State—not speaking of the Judiciary—so far as the levy of future taxes was concerned, and it was not a matter of concern to us in the Judge Advocate General's Office any more. We felt that the matter had been determined.

Mr. Dodson: That's all.

Mr. Green: That's all.

Mr. Dodson: Let the record show that, *inforar* as Complainant's Exhibit 46 is concerned, there will be no objection raised under the best evidence rule on the grounds that the original has not been produced, but that all other objections to the contents of the letter are reserved to the hearing.

Mr. Green: Let me ask you another question.

R D Q. 1. Mr. Sessions, referring again to the memorandum of September 14, 1943, Complainant's Exhibit 46, what was the specific problem having to do with the Tennessee gasoline tax and inspection fees on Government-owned gasoline at Chickasaw and Holston Ordnance Works?

A. The situation in those two ordnance works was iden- [fol. 553] tically the same in each, as I recall it. Those situations were used—they were just a vehicle to be used in discussing the whole problem of Government-owned gasoline.

R D Q. 2. Wherever you had Government-owned gasoline?

A. Yes sir.

R D Q. 3. Who used that gasoline?

A. As I understand it, it was used by Army contractors in the performance of their contract in constructing Government work.

R D Q. 4. It was used by the vehicles of the private contractors in the performance of their contracts?

A. That's my understanding.

R D Q. 5. What was the conclusion reached with respect to that gasoline?

A. The same conclusion as was reached with reference to all the other Government-owned gasoline.

R D Q. 6. Specifically that the Tennessee use tax did not apply to gasoline used by private contractors?

A. That's correct. There was considerable discussion of all of the different situations. It was not limited to those two ordnance plants. The entire field was explored so far as the Government's use of gasoline in the war effort in Tennessee was concerned.

R D Q. 7. Were the situations of the two ordnance plants

named in that memorandum similar to or different from the situation at the Milan Ordnance Plant?

Mr. Dodson: We object to the form of that question.

A. I don't believe I remember enough about the Milan [fol. 554] Ordnance Plant situation to be able to answer that question based upon my knowledge. I would have to guess, because I didn't handle the Milan Ordnance Plant situation, and was not in it.

Recross-examination.

By Mr. Dodson:

R. X Q. 1. Mr. Sessions, were you familiar enough with the Chickasaw Ordnance Works and the Holston Ordnance Works operations to know who stored the gasoline at those two facilities?

A. Mr. Dodson, I was interested only in the broad problem of these various taxes in the various states. I had no concern with specific operations of any particular contractor. My information came to me in the course of the performance of my duties on the various factual situations that arose. The question of storage in this situation was discussed by the people that I have mentioned, not only in connection with those two ordnance plants, but also in connection with all the other situations we discussed.

Mr. Dodson: Mr. Reporter, if you will reread my question, both for the benefit of myself and Mr. Sessions, one of us misunderstood it.

(Question read by the Reporter.)

A. (Continued) To be more specific in my answer, it was my understanding that the United States had service contracts for the storage of gasoline. The construction contractor, as I understood it, did not store the gasoline.

[fol. 555] R. X Q. 2. Have you ever seen those service contracts?

A. I have not, I haven't even seen the contracts for the construction of Chickasaw Ordnance Works or Holston Ordnance Works. All I was interested in was what type of contract it was.

R. X Q. 3. Then, you don't know what contractual arrangement the Federal Government had, through its Armed Forces Branches, with respect to the storage of gasoline at Chickasaw Ordnance Works and Holston Ordnance Works?

A. Not specifically, except what I was informed by Captain McNamara, who was intimately acquainted with those documents. All I was interest- in was the general overall picture and the facts that were pertinent so far as the impact of the taxes was concerned.

R. X Q. 4. At the time of the discussion, 14 September 1943, were you familiar with the service contracts—I mean, had you seen the actual service contracts that were in effect at that time between Standard Oil Company of Louisiana and the United States? I specifically refer to Complainant's Exhibit 35.

A. Mr. Dodson, there wasn't any conference on 14 of September.

R. X Q. 5. The conference referred to in your letter of 14 September.

A. No, I didn't see those contracts or that contract, but I was advised by my colleagues, respectively, from the office of the Chief of Engineers and the office of the Chief of Ordnance, that I have already mentioned, as to the effect of them, the general type of them. As to having seen the [fol. 556] specific contracts, I have never seen them in my life, that I can remember.

R. X Q. 6. And the same applies to the Chickasaw Ordnance Works and the Holston Ordnance Works contracts?

A. Mr. Dodson, I have never seen any of those contracts. It was not necessary in the performance of my duty, for me to see them. That was not my job.

Mr. Dodson: That's all.

Cicero C. Sessions, by F. Zimmer.

Sworn to before me at New Orleans, Louisiana, on the ninth day of June, 1950. Ferdinand Zimmer, Notary Public. (Seal.)

[fol. 557] DEPOSITION OF R. L. WEAKLEY—Filed July 25, 1951

R. L. WEAKLEY, being first duly sworn, deposed as follows:

Direct examination.

By Mr. Dodson:

Q. State your name and address?

A. R. L. Weakley, Nashville, Tennessee.

Q. Mr. Weakley, what is your employment?

A. Director of Gasoline Tax and Oil Inspection Division, State of Tennessee, and Coal Oil Inspector at Large, I reckon. I was appointed a few years ago. I believe the law says you hold until your successor is appointed, and the will of the Governor, and there has been no successor appointed and so far as I know if is satisfactory with the Governor.

Q. Mr. Weakley, how long have you been the Director of the Gasoline Division?

A. Since November, 1939.

Q. Continuously from November, 1939 to date?

A. Yes sir.

Q. Mr. Weakley, during the war years, we refer to them as that, and especially the latter part of 1943 and the early months of 1944, did you at any time during that period become familiar with the situation at Memphis respecting the storage of gasoline for the Government, or not?

A. Not too familiar; I knew about it.

Q. How did you first come to know anything about it?

[fol. 558] A. The inspectors wrote me letters about it, and deliveries were shown on their reports.

Q. By the inspectors, who do you mean?

A. Gasoline—well, the legal term for them is coal oil inspectors, or you might be more specific, deputy coal oil inspectors.

Q. What was done about it?

A. I went and talked to the Commissioner, and talked to

Q. The Commissioner was George McCanless?

A. Yes, and I talked to the Assistant Attorney General

at that time, General Barry, on two or three different occasions, and had some correspondence about it.

Q. In addition to the correspondence that you had, what did you do about it, if anything?

A. I notified the inspectors to report all gasoline coming into these storages.

Q. Did you advise them by letter *not?*

A. Yes, I advised them by letter, and over the telephone.

A. I will hand you two letters, the first letter dated March 2, 1943, which is on Department of Finance and Taxation stationery and is addressed to you, and signed by J. O. Johnson, Inspector. I will ask you if you recognize that letter and if in response to that you wrote the first letter that you wrote concerning this matter?

A. I wrote a letter in answer to his letter. I don't know whether that was the first letter I ever wrote or not.

Q. Is it the first letter that you have been able to find in your files?

[fol. 559] A. The first one I have, yes. I have not looked too much.

Q. You recognize that letter, then?

A. Yes sir, I received this letter.

Q. Who was the man that signed the letter?

A. J. O. Johnson, Inspector.

Q. He was a Tennessee inspector?

A. Tennessee Coal Oil Inspector.

Q. Will you file that letter, with the understanding that a photostatic copy may be supplied, as Exhibit No. 2, Defendant's Exhibit No. 2?

A. Yes sir.

Mr. Green: It is agreed that photostatic copy may be supplied.

(Document marked Defendant's Exhibit No. 2, witness, Weakley, and filed in evidence.)

By Mr. Dodson:

Q. You did reply to that letter?

A. Yes sir.

Q. I hand you a letter dated March 5, 1943, and ask you

if that is a copy of your reply, and the only copy that you have?

A. Yes sir, that is the copy of the letter in reply to that letter.

Q. Will you identify that and file as Defendant's Exhibit No. 3 to your testimony?

A. Yes sir.

(Document marked Defendant's Exhibit No. 3, witness Weakley, and filed in evidence.)

[fol. 560] Q. Mr. Weakley, after that time did you receive the reports in conformity with your letter?

A. We received some reports, I presume we received all the reports, because when I issue instructions like that to the inspectors, I presume that they carry them out in full.

Q. Did you ever write any letters to Standard Oil Company itself, respecting the gasoline which they were storing for the United States Government?

A. Yes, as I remember I never did write them but twice about it. I mentioned it in person a few times.

Q. You recall twice that you wrote them?

A. I think so.

Q. Mr. Weakley, I will hand you a letter dated December 16, 1943, and ask you if that is one of the letters to which you refer as having written the Standard Oil Company?

A. Yes sir, I wrote this letter.

Q. Will you file that as Exhibit No. 4 to your testimony, with the understanding that a photostat will be supplied?

A. Yes sir.

(Document marked Defendant's Exhibit No. 4, witness Weakley, and filed in evidence.)

Q. Do you recall when this other letter was written, Mr. Weakley?

A. No, I had forgotton about it. I don't know when it was written. Bill had this letter and showed it——

Q. Who had it?

A. Mr. Waller, and showed it to Clarence Evans and he showed it to me. I reckon he gave it back to Bill.

[fol. 561] Q. All right, sir, you say in addition to your letter writing, you had some conversations or conferences?

A. They were not with the Standard Oil Company, they were not conferences, just when I would see some of them and discuss this matter with other things.

Q. Who did you see of the Standard Oil Company and discuss this matter personally?

A. I don't know as I ever mentioned it to anybody except Mr. Desaix.

Q. What discussion, if any, did you have with him?

A. I think I discussed it with him once over the telephone and then I discussed it with him in Mr. Greene's office, not much of a discussion. He was ready to leave, and I could hear from one office to the other, and I went in to say "Hello," and he had had some business with Mr. Greene and in the conversation I said to Desaix, "You are not paying any tax on the gasoline you are storing for the Government down there." He said, "No." I said, "You ought to do something about that, Desaix, because it will come up again sometime, if you don't." He looked at me and laughed and said, "Well, I ain't paying it, am I," and I said, "No, but it will come up some of these times if you don't mind. George will get behind you." That is about the end of the conversation.

Q. Was that before or after the conversation with him on the telephone?

A. I would say I talked to him on the telephone about this prior to that, and I didn't call him about this specific [fol. 562] matter. He probably called me, and we was talking about something else and I just mentioned it to him.

Q. Do you recall that conversation, Mr. Weakley?

A. No, I don't, but I am pretty sure that I talked to him while he called me about another matter, and I don't know what that was. I just brought this up.

Q. Mr. Weakley, you made the trip to New Orleans, did you not, when we took the deposition of Mr. Sessions and Mr. Knight?

A. Yes.

Q. You were present when those depositions were taken?

A. Yes.

Q. Did you recognize Mr. Cicero Sessions?

A. I don't think I did in the beginning, but I did after I saw him.

Q. Where had you seen him previously?

A. I had seen him in a meeting in the Attorney General's Office just as he outlined in his testimony.

Q. Do you recall what took place at that meeting with respect to the discussions about Government-owned materials?

A. Yes.

Q. Gasoline and otherwise?

A. Yes, we were discussing about materials defined in Sub-section (b) and (c) of the Gasoline Tax Statute, toluol; and there were other similar substances which Shell Oil Company was selling a lot of material at Millington to the Government, and then the question of the distributors [fol. 563] storing gasoline. I talked to Mr. McCanless about it, and he and I agreed that we wouldn't collect any tax on these substances defined in Sub-sections (b) and (c).

Q. Why not?

A. Because under Chapter 288 of the 1937 Legislature, they could qualify as an industrial user and obtain a refund of the tax, and we were in a war and they were busy and so were we. There was no use to collect it and turn around and give it back to them. I made that statement in that meeting that we would go along with these substances defined in Sub-section (b) of the definition of gasoline, but under no instance would I ever agree to let anybody store gasoline without paying the tax.

Q. You refer to Sub-sections (a), (b), and (c)?

A. Yes.

Q. Distinguish those, not technically, but just generally so we can understand this as we go along?

A. Sub-section (a) says that any volatile substance produced from petroleum—this is in substance—heretofore sold under the trade name of gasoline. Sub-section (b) in substance says volatile substance produced from natural gas, oil, shale or coal, with the gravity above 16 and flash below 112 degrees Fahrenheit; and sub-section (c) says Benzoil or any other similar substance mixed with gasoline as a motor fuel. Now, Chapter 288 of the 1937 Legislature allows a refund on gasoline as defined in Sub-section (b) and (c), and does not allow refund on gasoline as defined in Sub-section (a) when it is used for industrial purposes.

Q. Then as I understand it, the Legislature's construc-

[fol. 564] tion of that is that aviation gasoline and automobile gasoline, those things fall under Sub-section (a)?

A. That is right.

Q. And these toluols and ethers——

A. All of that is under Sub-Section (b) and is subject to refund when used for industrial purposes, provided the party using it is qualified as an industrial user.

Q. At any time at that conference did you or Commissioner McCanless or anyone in your presence agree that gasoline, this gasoline that was being stored at Memphis in Esso Standard Oil Company's tanks would be exempt from the State tax on gas?

A. No sir.

Q. Did you make any statement about it at all?

A. Yes, I stated that we would go along with this toluol and the other substances that were defined in Subsection (b), because there was no use to pay us money and us turn around and pay it back to them. I said I would never agree for anybody to store gasoline in Tennessee, any distributor, without assuming the tax.

Q. Did you have any further conferences at which Major Cicero Sessions, or anyone else representing Standard Oil Company, the War Department, Federal Government, were present?

A. Yes,

Q. Respecting the storeage of gasoline?

A. Yes sir.

Q. When was that?

A. Well, I don't know when these times were. It was [fol. 565] during the war, I never kept up with the times.

Q. State as best you can the time and who was present and what took place and what you were discussing?

A. Early after the United States entered the war, I would say within 18 months, I think it was less than that, there was a fellow by the name of Anderson who I had met three or four times, he had been Secretary of the North American Gasoline Tax Conference, and later was President of the North American Gasoline Tax Conference. He was a young fellow, and had joined the Army in some department and had been given the responsibility of arranging for gasoline for the Army purposes. He came into Commissioner McCanless' office and Commissioner McCanless called for me

to come up there. We all sat there and discussed it and agreed how the gasoline could be handled for the Government without the tax accruing on it. He agreed with us on that matter.

Q. What agreement did you reach?

A. That the Government could lease facilities and ship gasoline to that, and unload it in those facilities, store it in those facilites, and distribute it itself, to the various branches or distribution points of the Government. That is, the gasoline would never come into the hands of anybody except the Government. Anderson asked me if there was any place he could get around here, and I told him there were two, this Mac Fuqua's company over here under the Woodland Street Bridge, and Ingram's plant out here near the Penitentiary.

[fol. 566] Q. You speak of Mac Fuqua's company, do you know what name it operated under?

A. River Terminal Company, I think.

Q. The other was Ingram?

A. Yes. Both of them were idle.

Q. Gasoline rationing had already gone into effect at that time, hadn't it?

A. Yes sir. Most of the boys that run those places were in the Army and they had to close them up.

Q. Do you know whether or not this Anderson made any such contract with anybody?

A. He made a contract of some kind with Mr. Ingram and set up a company, he or the Government or somebody. They didn't handle it under the name of Ingram. They leased the facilities there and set up a company and handled this gasoline in some other name. River Company or River Terminal Company or something like that, and made another contract with Southern Oil Service out here, which was then Abeles, who is now dead, he owned the Southern Oil Service and they made a contract with him to distribute the gasoline, I mean Anderson or the Government, Anderson represented the Government, he made it for the Government, and they shipped the gasoline up here, the property of the Government, in the barge, unloaded it into these storage tanks that they had leased from Ingram and Abeles picked it up from the storage tanks and distributed it to Smyrna and various places for the Government under con-

tract with the Government, and it never came to rest in the [fol. 567] hands of anybody else, and some of the inspectors got out there when it first started and picked up a sample and it was listed on our ledger, and when it came to my attention, I told them there was no use to go out there, that that gasoline was Government gasoline, we had nothing to do with it and just to let it alone, and we never bothered that terminal any more as long as the Government was out there.

Q. Whose employees were out there, Ingram's, the Government's—or whose?

A. I don't know whose the employees were that looked after the plant and the unloading, but I either heard or for some reason have in my mind, and I don't know, that they were employees of Abeles; that Abeles took the job of unloading and distributing.

By Mr. Dodson:

Q. Did you see the contract that was entered into with respect to the Ingram tanks?

A. I think I did.

Q. Do you recall what was in the contract at this time?

A. No sir, I saw a half dozen of them contracts. I don't recall anything in any of them except one thing, that the Government insured Standard Oil Company on them. I never did see Tennessee Oil.

Q. Did you ever have any further conferences with this man, Anderson? Let me ask you this, do you know what his capacity was?

A. No, I don't.

Q. Do you know what his title was?

[fol. 568] A. No, I don't. He was in uniform.

Q. What uniform?

A. Army uniform, I believe. It was khaki color. I never knew too much about them fellers.

Q. Was he an officer or enlisted man?

A. He was some kind of an officer. He was not just a buck private.

Q. When did you next see him or discuss this matter with him, if ever?

A. I saw him, after that, around Nashville here a time or two, but I never discussed it with him any more. I never

discussed any thing with him. I would just meet him on the street or something and speak to him, shake hands with him, and ask him how he was.

Q. Did you see him elsewhere than in Nashville?

A. I saw him at the North American Gasoline Tax Conference in St. Louis. I can't be positive whether the conference was held in St. Louis, but it must have been around November, 1943 or 1944. It must have been 1943. It was after this had happened there. Possibly it was the same year. Then he was still in the same business.

Q. What discussion, if any, did you have with him at that time?

A. I was in his room with another soldier, in the same business that he was in. We were talking about this matter, and the other soldier suggested that there was no trouble about that, to go on and store it. Anderson looked around at him and said, "No, it is not like that in Tennessee. That law is different." We sort of laughed about it.

[fol. 562] Q. Mr. Weakley, respecting this gasoline that was being stored at Memphis, Tennessee, you have identified the letter that you sent to your inspector, and you have identified the letter that you sent to the Standard Oil Company advising how that should be reported?

A. Yes sir.

Q. Did you ever, as Director of this Division, in your official capacity or otherwise classify that gasoline as being tax exempt?

A. No sir.

Q. Did you ever receive any instructions as to whether it was tax exempt or was not tax exempt?

A. No sir.

Q. Did you ever seek any instructions as to whether it was tax exempt or not tax exempt?

A. I discussed it several times with Mr. McCanless and General Barry.

Q. General Barry you are referring to was at that time the Assistant Attorney General of the State of Tennessee, W. F. Barry, Jr.?

A. Yes sir.

Q. And still is?

A. Yes sir. I believe he is Solicitor General now.

Q. Solicitor General now, he was Assistant Attorney General then?

A. Yes sir. It is the same thing, no matter what you call it.

Q. What instructions did you receive? That is, in the [fol. 570] course of those discussions?

A. Didn't either one of them ever tell me not to collect the tax or to collect the tax. They just didn't give me any instructions further than that letter goes right there.

Q. That was to be reported?

A. Tell them to report it and report it separately, I believe the letter says.

Q. And so you set it up on your boks as a separate item?

A. That is right.

Q. Did you ever advise any representative of the War Department or the Federal Government of the Standard Oil Company, or its successory, Esso Standard Oil Company, that it was not subject to tax?

A. No, sir, I always thought it was.

Q. When was demand, as far as you know, formal demand, first made on Standard Oil Company or Esso Standard Oil Company to pay the tax, if it has ever been made?

A. It was made about in the middle of the year 1949, I think, or near that time, the latter part of 1949. After it come up, then the figures had to be gotten up. It took some little time.

Q. And by way of summarization, I think there is no question about this, from the month of January 1944, it was paid under protest and this suit resulted and that is what we are litigating about?

A. That is right.

[fol. 571] Q. Now, you say it was always your insistence that this gasoline was subject to tax?

A. Yes.

Q. Why didn't you collect the tax at that time?

A. I don't know. It was not my policy to tell the Attorney General or the Commissioner what to do. I have worked for several of them, and it was not my policy to tell them what my opinion is. I merely asked for theirs. We would discuss it, and the discussion would be over and still they had not told me wether to or not to collect it.

Q. In other words, you never received any instructions to not collect it and you never received any to collect it?

A. That is right.

Q. And as a result you did nothing.

Q. Did you have anything to do with how this was classified on the books of the Department or the division?

A. It was evidently classified by the folks receiving it, telling the inspector this was not taxable, that it was Government gasoline. The inspector had no authority to direct whether things are taxable or non-taxable. It is the inspector's duty to report the substance delivered, and show what the distributor says about it as to whose it is, and so forth, what it is, and further than that he makes an analysis of it to determine what it is. As to whether it is taxable or non-taxable, he takes the distributor's word for that, but that doesn't mean anything to us.

Q. You have examined, have you not, Complainant's Exhibit No. 44?

A. Yes, we had this ledger sheet in there.

[fol. 572] Q. That, then, is taken from the official files of your Division, is it not?

A. Yes sir, and it was copied on this sheet from the inspector's report.

Q. Were you familiar with the fact that that record was being kept?

A. Yes.

Q. Insofar as that record is concerned, the record kept in your Division, how was this gasoline classified, taxable or non-taxable?

Mr. Waller: I object to that on the ground that the records themselves are the best evidence.

Mr. Green: So far as we are concerned, we are ready to let him go into it, so far as the Government is concerned.

By Mr. Dodson:

Q. Answer the question.

A. This should be a copy of the inspector's report, and this should contain the same thing that the inspector's report shows.

Q. My question was, that record that you kept in your office that you have before you, Complainant's Exhibit No. 44,

how does it show the gasoline was classified, as taxable or non-taxable?

A. It shows it in the taxable column, and I instructed them to put it in the taxable column, regardless of what the inspector wrote on it.

Q. Mr. Weakley, during the course of the proof in chief [fol. 573] offered by the Complainant and the Intervenor in this case, there was some proof introduced with respect to some exports, or claimed exports, of gasoline. Explain for the record how export gasoline, which qualifies under the Statute, as export gasoline until it is exported. It comes to rest in Tennessee, and it is put on the receipts and stored; and when it is exported, they are relieved of all the tax and all the inspection except one-twentieth of a cent a gallon.

Q. How do they get relieved of that?

A. They may get relieved by either listing it on their returns to the office and taking credit for the first month's report, or if they don't owe the Department enough to absorb their exports, they may file a claim for refund.

Q. Was either method followed by the Complainant, Standard Oil Company, or Esso Standard Oil Company, with respect to any of this gasoline that was stored at Memphis?

A. If there was, it could not be identified.

Q. If it was, you don't know of it, you say?

A. That is right, couldn't identify it.

Q. Mr. Weakley, do you know of anyone, except the Standard Oil Company, who stored gasoline for the Federal Government, or War Department in their own facilities?

A. Tennessee Oil Company is the only other one I recall at this time.

Q. If there were others, you don't recall them?

A. No.

[fol. 574] Cross-examination.

By Mr. Green:

Q. Mr. Weakley, you are a Gasoline Tax Administrator of national reputation, I am fully aware of that. As such, during all of the period involved here, and from some time

in 1939, it has been your duty to collect gasoline taxes for the State of Tennessee under and in accordance with the Tennessee statutes, is that true?

A. Yes sir.

Q. You have testified here today that you have consistently taken the position that any storage of gasoline, Government-owned or otherwise, in facilities owned by an oil company, or facilities owned by anyone other than the United States, was subject to tax, is that correct?

A. By Tennessee distributors, yes.

Q. I believe that I understood you to say that you were familiar with the River Terminal situation, or the River Petroleum Company situation, after the discussions with a Mr. Anderson, who I don't know, and who I never heard of except from you, is that correct?

A. I wouldn't say too familiar, but I testified that it was my understanding that he rented that and how he handled it, I explained the way I understood it.

Q. It was your understanding that the River Petroleum concern was storing Government-owned gasoline?

A. Yes sir.

Q. It was your understanding that such storage was in Government-owned facilities?

[fol. 575] A. Yes sir, that they had them leased from Mr. Ingram.

Q. And you testified that you did not demand or request payment of tax on account of such storage?

A. That is correct.

Q. You are quite sure of that?

A. Yes.

Q. On the other hand, you testified that you have consistently taken the position that the Esso Standard Oil Company, or the Standard of Louisiana storage at Memphis was taxable?

A. Yes sir.

Q. You are familiar, of course, with the collection of the Tennessee gasoline tax, are you not, particularly the litigation that comes up in your office?

A. Yes.

Q. Did the State of Tennessee ever take any action to collect taxes on account of gasoline storage at River Petroleum Corporation?

A. Not that I know of.

Q. You don't know?

A. Not that I know of.

Q. I will refresh your recollection by going to the Supreme Court of Tennessee decision where that case was involved and where your Department insisted upon and did collect the tax?

A. Oh, that plant out yonder?

A. Yes.

A. I have no recollection of that. I have no recollection of it being started or stopped.

[fol. 576] Q. Is it or not a fact that the inspectors mentioned in the testimony here today are subordinates of yours and were such during the period involved in this suit?

A. Mr. Green was. I am a subordinate of Mr. McCanless, or was.

Q. Do you know Mr. R. M. Frazier?

A. No.

Q. He was an inspector in your Department in January, 1944?

A. Frazier, yes, I know him. He was an inspector.

Q. And in due course you received from the inspectors the daily inspection reports, did you not?

A. Yes sir.

Q. And I assume you received the monthly reports that Standard Oil Company was required to file and did file?

A. Yes sir.

Q. Were those two records checked against each other for accuracy?

A. The inspectors' reports were listed on the books, and the return was checked against the books.

Q. I hand you your inspector's report by Frazier for January 28, 1944, and ask you to look at it.

(Document passed to witness.)

A. Well, what do you want to ask about it? That is a photostat of the record of our office for that date I am sure. It looks like ours.

Q. I will ask you to look at it.

Mr. Dodson: We will stipulate that that is a photostatic copy of the record.

[fol. 577] By Mr. Green:

Q. The fourth item under the column, "Who is liable for tax," and I will ask you to examine that.

A. Well, frankly——

Q. I just asked you to examine it. I didn't ask you for any comment. I will ask you to look at the three items just above that.

A. Yes.

Q. The first three items, as I understand from reading it, and I will ask you to correct me if I am wrong, are interstate shipments, "Interstate," is the word, followed by ditto marks following Items 2 and 3?

A. Standard Oil Company of Nashville, yes.

Q. The fourth item is a ditto mark, overwritten with the word, "Exempt", is that correct?

A. Yes; it looks like "Exempt".

Q. Did your inspector write that?

A. Well, I don't know.

Q. Or was that entry made or that correction made in your office?

A. That might have been made by Mr. Aiken in the office. I wouldn't know. I wouldn't say that the inspector did it or Mr. Aiken did it. I don't know.

Q. It was made in the office, Standard Oil Company didn't make it, did it?

A. No, I could say they didn't.

Q. The word "Exempt" is written over the ditto marks?

A. Yes sir.

[fol. 578] Q. Did you give instructions to the inspectors?

A. Yes sir.

Q. What instructions did you give the inspectors with respect to Government-owned gasoline stored either at Memphis by Standard Oil Company, or in other points, by Tennessee Oil Company or by River Petroleum Corporation?

A. It is in those letters I filed here as exhibits.

Q. Could you produce those letters?

A. Yes. It is in the letter to Mr. Johnson. (Exhibit 3.)

Q. You regard that letter as a letter to your inspectors?

A. This is the only instructions to Mr. Johnson, but they were all given similar instructions.

leased to the United States Government, or if it was, I didn't know it.

Q. And you knew it was not owned by the United States Government?

A. I knew it was not owned by the United States Government.

Q. So you and the Commissioner and the Attorney General's Department knew all of those facts in 1943, 1944, 1945, and 1946?

A. Yes sir. I didn't discuss it with them, I will say, over two or three times over a period of six months, and then I never said anything about it any more.

[fol. 591] Q. You mentioned the River Terminal Company and the River Petroleum Company, they were two entirely distinct companies, were they not?

A. Yes. I mentioned them in saying that I told Anderson what might be available.

Q. And the River Petroleum Company was the company that you thought was a Government-owned corporation?

A. Yes. Well, it was the company that I thought the Government had leased the facilities for the purpose of handling it in the way that we agreed they could handle it.

Q. As I understood, what you thought was that Ingram had leased the tanks to River Petroleum Company and River Petroleum Company——

A. If that is the proper name, Bill, I don't remember. I know Ingram had leased the tanks to the Government, and they called it the River Petroleum Company. That is what I thought about it.

Q. You thought the River Petroleum Company was the Government?

A. Yes; and that the material came to rest in the hands of the Government and they had a contract with Abeles to distribute it and therefore never got in the possession of anybody except the Government. That is what I thought about it; and based upon that, I told the inspectors there was no use to go out there.

Mr. Waller: That is all for the present. I want to reserve the right to recall Mr. Weakley for further cross examination.

Q. Did you circularize your inspectors?

A. Every so often I did.

Q. What did you tell the inspectors to do with respect to Government-owned gasoline?

A. In substance the same thing I told Mr. Johnson.

Q. Forget the substance, what did you tell them?

A. I would have to have the letter to each one of them to tell you.

Q. Is that the only letter you have, or do you have other letters?

A. That is the only one here.

Q. Can you produce other letters?

A. I wouldn't be sure about that.

Q. Can you produce a single other letter?

A. I couldn't be sure.

Q. Can you produce a single letter giving instructions to [fol. 579] any inspector with relation to Government-owned gasoline stored by any contractor or any oil company in Tennessee?

A. Let's see that file. I might have one there. Mr. Green, there is any number of general letters in the office.

Q. Did you or did you not disseminate to your inspectors mimeographed instructions?

A. There is another one in here somewhere. There wasn't but two points that it was necessary——

Q. Mr. Weakley, I am not asking you for an explanation. I asked you the question which can be answered, yes or no.

A. I will let you ask it over, and I will answer it yes or no, if that is the answer.

(The last question was read to the witness.)

A. Here is one.

Q. May I see it?

A. Yes. (Letter passed to Counsel.)

Q. This letter which you have specifically mentioned refers to a shipment and doesn't relate to the Memphis Terminal, does it?

A. No, it does not. That was at——

Q. I am asking you the question, whether or not you got instructions out to your inspectors by way of a mimeographed instruction?

A. The last thing you asked was if I had any other letter that I had ever wrote any of them, and you got it there.

Q. I introduce this letter in evidence in response to the question asked.

A. Here is a general letter to all qualified Tennessee gasoline distributors.

[fol. 580] Q. That is your answer, I will introduce it in evidence.

(Document marked Complainant's Exhibit No. 49, witness Weakley, and filed in evidence.)

Q. I will ask you if it is or is not a fact that you instruct the inspectors to merely report receipts of Government-owned gasoline as a matter of gallonage check, and advised them that such shipments were not subject to tax?

A. If I ever advised them that was not subject to tax, it was only based on the theory that the party receiving it contended it was not subject to tax.

Mr. Green: Will you read the question?

(The last question was read to the witness.)

By Mr. Green:

Q. Is that your answer?

A. You heard Mr. Greene testify, did you not?

A. Yes.

Q. Was his testimony substantially correct?

A. It was correct, with the exception of his memory on one or two items, which were similar to the thing that you all referred to here about somebody testifying that they had never seen a contract or something of that sort.

Q. Mr. Weakley, you have testified about Mr. Anderson, who you say was in the Army, an officer and not a buck private to quote you. Do you know in what branch of the service he was?

A. No.

Q. Do you know whether he had or had not authority to execute contracts?

A. No.

[fol. 581] Q. Do you know of any contract which he executed for and on behalf of the United States?

A. He negotiated this contract out there, but I imagine it was signed in Washington.

Q. Do you know of a single contract that Mr. Johnson negotiated for and on behalf of the United States, with anybody in Tennessee?

A. He negotiated this contract, but I presume it was signed in Washington.

Q. With whom?

A. Mr. Ingram.

Q. What contract is that?

A. The contract where he leased Mr. Ingram's facilities.

Q. Who told you that?

A. Well, that was four or five years ago, I don't know.

Q. Do you have any information on that subject, other than what you got from Mr. Anderson?

A. Yes, I think we had information from Mr. Ingram.

Q. Is Mr. Ingram available?

A. He might be. He is in and out of here.

Q. So far as the Government is concerned, we don't know Mr. Anderson. He has not negotiated any contracts that we know of, and he is a man of non-existent quantity, not to doubt your word, but we don't know him.

Mr. Cummings: I object to that statement on the part of Counsel.

By Mr. Green:

Q. I am trying to find out who Mr. Anderson is and where he could be reached.

[fol. 582] A. I could find out.

Mr. Cummings: I make an objection to a statement of that sort in the record.

The Witness: I did write to find out where Mr. Anderson was, and if he could be reached, and I got the information, and it is like my letter that we talked about that Bill had that he said he gave Clarence Evans, Bill hasn't got it back. I gave that to somebody. These lawyers or Clarence Evans, I don't remember who I gave it to and I don't know where it is now. I gave them the name and address. I can get it again.

By Mr. Green:

Q. Mr. Weakley, as Administrator of this Gasoline Tax Division of the Tennessee Department of Finance and Taxation, you know, and you knew contemporaneously, that if the gasoline, Government-owned, moving into the Memphis Plant were taxable, that the amount of tax on a monthly basis due and owing to the State of Tennessee was well over a quarter of a million dollars a month, did you not?

A. No, I knew it was an enormous amount.

Q. It is a fact that it amounts to approximately well over a quarter of a million dollars a month, does it not?

A. It amounts to a considerable amount. I don't know how much, whether a quarter or a half million.

Q. Did you, or any of your subordinates in your office, or Mr. McCanless when he was Commissioner, or Mr. Carson when he was Commissioner, ever make demand upon the Standard Oil Company of Louisiana or the Esso Standard Oil Company, or the Tennessee Oil Company, or [fol. 583] the River Petroleum Corporation, or anyone storing Government-owned gasoline for the payment of the tax?

A. No.

Q. Is it customary in your office to let four or five million dollars accumulate in monthly instalments, two or three hundred thousand dollars a month, for a period of some years, without making demand for payment?

A. No.

Q. Why did you not make demand for payment in this case?

A. Well, it is in my direct examination, but I will tell you too.

Q. I want it again.

A. That I discussed it with Mr. McCanless and General Barry some several times, and they never did tell me to collect it or not to collect it.

Q. Is it or not a fact that General Barry told you that he didn't think the tax applied?

A. No.

Q. Doesn't he tell you so today?

A. No, he has not yet. You are the only one he has told that. I don't know.

Q. Why did you talk to General Barry about this?

A. Because I wanted to know. It was not being paid, and I wanted to know whether to collect it or not.

Q. And you thought it was due and owing?

A. Yes.

Q. And you did nothing to collect it?

A. Except to talk to him and the Commissioner.

[fol. 584] Q. Did you do anything with relation to the Tennessee Oil Company?

A. I am not sure that I talked to General Barry about the Tennessee Oil Company, because it was an identical case, and it did not start until after this one had gone on some time.

Q. Did you go to Mr. McCanless or Mr. Carson?

A. I went to Mr. McCanless.

Q. And suggested to them, or demanded?

A. No, I don't demand of my superiors.

Q. Did you make a recommendation to them?

A. No, I asked them.

Q. You asked them what?

A. What I stated to them would be hearsay.

Q. You asked them something, what did you ask them?

A. I asked them should we collect this tax or not.

Q. What did he tell you?

A. Who is "he"?

Q. Mr. Carson or Mr. McCanless?

A. We discussed it, and I don't remember what they told me, but they didn't tell me to collect it or not to collect it.

Q. In other words, you asked them a question and they didn't answer it, both Mr. McCanless and Mr. Carson?

A. They answered it in a way.

Q. What did they answer? You say, "In a way," tell us how they answered it?

A. I don't remember, and I don't pretend to admit that I remember the conversation word for word that took place five years ago, and you don't, and you don't even expect me to.

[fol. 585] Q. Let me tell you something, Mr. Weakley, if there are $15.00 involved in a conversation, as I am a poor man, I will remember it ten years, and you are dealing with millions of dollars.

A. That is your $15.00.

Q. $15.00 is a lot to me, and you were dealing in millions, and I asked you, you asked them a question. Now, I want to know if you can give the answer they gave you, Mr. Carson and Mr. McCanless?

A. They did not answer me in a way. They didn't say, "Yes, get it," or "No, don't get it." We just discussed it and I never did get a direct answer either way.

Q. Would you have the Court believe that Mr. McCanless was so disinterested in the accumulation of $250,000.00 a month there in gasoline taxes that he couldn't tell the head of his Gasoline Tax Division whether to proceed with collection or to take no action?

A. I would imagine that Mr. McCanless had an opinion from the Attorney General?

A. No.

Q. Didn't you sit at a conference with Mr. McCanless and Attorney General Barry and Assistant Attorney General Harry Phillips when this discussion was had, which you remember from the aspects of toluol?

A. I don't remember ever sitting at a conference in which Harry Phillips was present, although he could have been.

Q. Did you participate in the conference with Mr. McNamara, Major Sessions, and Captain Handlon, at which General Barry and General Phillips and yourself and Mr. [fol. 586] McCanless were present?

A. I have no recollection of two of the gentlemen you named, but I remember the conference in which this fellow from New Orleans was present.

Q. Your memory doesn't permit you to contradict them on that, does it?

Mr. Dodson: Contradict them on what?

By Mr. Green:

Q. Your memory doesn't permit you to contradict Major Sessions, or Captain Sessions as he then was, as to that conference, that it was had and he was there?

A. It was had and that I was there?

Q. And do you remember being there?

A. I remember being there. I testified to that on direct examination.

Q. Would you have the Court to believe that those men——

A. I want you to know my answer. I remember two of the gentlemen you mentioned. I remember being in a meeting when Sessions, I believe you called his name, was there, Cy Hepley was there, the Commissioner was there, and General Barry was there, and some other people.

Q. You would not have the Court believe, after having read the memorandum report which Mr. Sessions made of that meeting, that the Ordnance Department and the Engineers Department of the Army, and the Judge Advocate General's Office sent me representatives to discuss merely toluol and cleaning solvents, would you?

[fol. 587] A. No, and I stated on direct examination about that.

Q. Did you ever discuss this question of tax liability with Assistant Attorney General Harry Phillips?

A. I don't think I ever discussed these cases with General Phillips.

Q. Did you ever discuss the question of storage of Government-owned gasoline with the Assistant Attorney General Phillips?

A. I don't think so. I never went over to his office for that purpose. We might have discussed it in passing sometime.

Q. I want to refresh your recollection, if I may, having to do with Oak Ridge, where Government gasoline was moved in and stored, and distributed to the contractors when Oak Ridge was under Manhattan District, does that refresh your recollection?

A. No, I don't. The only thing I remember about Oak Ridge was that gasoline was received up there by a bus company, and we collected the tax on it, and they went back to the Government receiving.

Q. I am speaking now of the large gallonage of gasoline that went into the operation of that plant, noting bulk that went in, and was stored by Carbide Carbon, which ran into tremendous gallonage?

A. I understand from General Barry that some of the Government's representatives were in here and for some reason, but I don't remember what. They agreed that they

would buy the gasoline used at Oak Ridge from Knoxville pay the tax and be distributed within the State, and I know a great portion of it was done like that, and we didn't try [fol. 588] to check Oak Ridge, because we had learned something about what it was and we stayed away from it, because they had agreed to buy the gasoline after it had already come to rest.

Q. I want to ask you to give me the name of any taxpayer who paid to you, or your office, any gasoline tax on account of the storage or distribution of Government-owned gasoline during the period covered by this case, any single one?

A. Well, I would have to look that up. It was a transportation company at Oak Ridge.

Q. I am not talking about transportation companies. I am talking about gasoline oil company distributors who received and stored Government-owned gasoline?

A. No, I don't know a distributor, because I don't know of any distributor except Tennessee Oil and Standard Oil that sotred.

Q. River Petroleum Company did?

A. Under a different situation, as I understand.

Q. Have you seen the River Petroleum contract?

A. I think I did.

Q. You are of the opinion that there is a difference between this contract and that contract, and that is one of impression rather than one of knowledge?

A. My impression is that it was handled in a manner in which the State of Tennessee couldn't collect the taxes because it was never in possession of anybody except the Government while it was in Tennessee; whereas, this gasoline was in the possession of the distributor and stored in Tennessee.

[fol. 589] Q. You base that distinction upon having read and looked at Defendant's Exhibit No. 1, in this case?

A. What is Exhibit No. 1?

Q. The River Petroleum Company contract which you mentioned and we went to the trouble of getting, and which your Counsel introduced as Defendant's Exhibit No. 1?

A. I base it on being familiar with the operations out

there and how it was carried on, and my understanding at the time.

Q. As disseminated to you by Mr. Anderson?

A. Yes sir.

Further cross-examination.

By Mr. Waller:

Q. Mr. Weakley, in 1943, you familiarized yourself fully with the facts regarding the handling of this Government-owned gasoline by the Standard Oil Company of Louisiana, did you not?

A. Well, I wouldn't say I did, Bill, I don't know, I done the best I could at it. It was at Memphis and I was up here and everybody was working on short help, and we couldn't do too well about it.

Q. You have not found out since this lawsuit was started any facts about it that you didn't know then, have you?

A. Some.

Q. In other words, there was no concealment from you by the Standard Oil Company?

A. No.

[fol. 590] Q. Were you fully aware of how the gasoline was handled and of the facts that have been disclosed in this lawsuit?

A. Yes, I think so now, after hearing the testimony.

Q. And you discussed those facts with Commissioner McCanless, and with Assistant Attorney General Barry, did you not?

A. Well, I was not as familiar with those facts then, as I am now. I discussed the fact that they were storing gasoline down there, on which they were not paying the tax, and that was reported that it was Government gasoline.

Q. And you knew the tanks were owned by the Standard Oil Company, or leased by the Lion Oil Company to the Standard Oil Company?

A. Yes sir.

Q. And you knew the tankage was not leased to the United States Government?

A. If it was, I didn't know it. I presume that it was not

[fol. 592] Further cross-examination.

By Mr. Green:

Q. As I understand it, from your knowledge and understanding of the River Petroleum contract, you considered the storage there as non-taxable?

A. That is right.

Q. And you still so regard it?

A. Yes.

Q. Under your Statute?

A. Yes sir, the way I understood the operation.

Q. And would it follow that if the contract between the United States and the Esso Standard Oil Company, or the Standard of Louisiana, was it the same type of contract, then would you regard it as a non-taxable transaction; just as in the case of River Petroleum Company?

Mr. Dodson: We object to the form of the question because the answer in the previous was the River Petroleum Company's contract as he "understood the operation."

By Mr. Green:

Q. I said if the Esso Standard Oil Company's contract was the same as the River Petroleum Company's contract, you would regard it as a non-taxable transaction?

A. Yes.

Mr. Dodson: I still object to the form of the question, because the question still does not state the River Petroleum Corporation's contract as he understood it to be, and that is all he testified about.

[fol. 593] By Mr. Green:

Q. The distinction you made between tax liability and non-tax liability, in the case of River Petroleum Corporation and the Standard Oil Company of Louisiana, was one based upon the separate contracts, is that true?

A. Yes sir.

Further cross-examination.

By Mr. Waller:

Q. One more question at this time, and I will still reserve the right to recall you, Mr. Weakley. I asked you if you knew the facts about the way the gasoline was being handled, you also saw the contracts between the Standard Oil Company of Louisiana and the Government, did you not?

A. Yes sir.

Q. The same one that is in exhibit in this case?

A. Yes sir.

Q. And Commissioner McCanless also saw them, did he not?

A. I think so.

Q. In fact, you got them from him, did you not, and he got them from the Standard Oil Company?

A. I believe that is right. He got them and would give them to me, or I would get them and give them to him. I believe I got those from him.

Redirect examination.

By Mr. Dodson:

Q. Mr. Weakley, you have been asked several questions about the Ingram contract, or the River Petroleum Corpora-
[fol. 594] tion contract, or the River Terminal Company contract. Do you know anything about a River Petroleum Corporation of New Orleans, Louisiana?

A. No sir.

Q. Did you ever hear of that company?

A. It seems like in this lawsuit I heard of it one time.

Q. Is that the company that you are referring to in your statement here, or do you know?

A. No, in my statement I referred to what these gentlemen called the Terminal out here, after Ingram leased it to somebody, and I thought the Government. The only difference to me, as I understood it, and the reason I asked the tax on one and not on the other was that this Ingram plant was leased by the Government and operated by the Government, whereas these other operations were leased

and operated by the folks who leased them in conjunction with their own business.

Q. You were asked some questions about Exhibit No. 42, several questions. That is the exhibit, for your information, that the inspectors' reports were shown on, and it had a notation on the fourth item on that page, "Exempt." Now, was that information from the inspector's report taken onto your ledger sheet at the Department?

A. Yes. In other words, the ledger sheet is supposed to be a correct copy of the inspector's report.

Q. Can you trace from Exhibit 42, that fourth item where the notation "exempt" is found in somebody's handwriting, can you trace that onto Complainant's Exhibit No. 44?

A. $398,031.00.

[fol. 595] Q. On your ledger in the office under your supervision and control, how was that item carried, in which column?

A. "Gasoline taxable."

Q. And that is the item which is located on Page 2 of that Exhibit No. 44, sixth from the bottom in the column, "Gallons Taxable," is that right?

A. Yes sir.

Recross-examination.

By Mr. Green:

Q. Do you still have that exhibit in front of you, Mr. Weakley, No. 44?

A. Yes sir.

Q. On that second page, the shipment you referred to was "DPC424", is that correct?

A. Yes sir.

Q. In the column to the right, is "Gallons non-taxable," is that correct?

A. That is right.

Q. I will ask you what those two columns mean?

A. The "Gallons taxable" means gasoline and the "Non-taxable" means materials subject to inspection and not gasoline.

Q. In other words, that entry does not mean you considered it other than a taxable commodity, under your statute?

A. Well, call it anything you want to.

Q. That is, that it was gasoline rather than non-gasoline?

A. That is right. When analyzed it is subject to tax under our law, and the next column is substance not subject to tax.

[fol. 596] Q. That is the classification by the nature of the produce rather than of tax liability?

A. That is right.

Q. Now, will you look over at the extreme right hand column, "No Barrels," and there is in handwriting some checks. What are the words there, on the second page, right at the very top?

A. It looks like, "No claim due."

Q. What does that mean?

A. I don't know what it would mean in this case, but if it was a substance on which tax was paid, and on which the distributor was going to file a claim——

Q. Couldn't claim that. They had not paid any tax.

A. It is written up here, and there is another case with that dittoing all the way down.

Q. I ask you if it is not a fact that your whole journal with respect to Government-owned gasoline is headed either by tax-exempt or Government gasoline, "No claim due"?

A. That I don't know. I presume they did write something on it. However, that is for the benefit of the fellow who is keeping the books and the inspector, and neither have any authority.

Q. There was no tax set up against these shipments in your journal?

A. No, other than to put in the taxable column.

Q. Not until it was determined in 1949?

A. There was no handling in the journal in that case. It was left like it was.

Q. Until the deficiency here involved was determined [fol. 597] in 1949, your journal showed no tax liability on account of Government-owned gasoline due by Standard Oil Company?

A. That is right.

Q. And showed no exemption.

Mr. Waller: I want to renew my objection if I may, to the testimony where Mr. Weakley was asked what the rec-

ords showed, for the reason that what the records show is best shown by the records themselves.

Further deponent saith not.

R. L. Weakley, by T. Roy Hix, Reporter.

Sworn to before me at the time taken, the 31st day of January, 1951. T. Roy Hix, Notary Public, State at Large. My Commission Expires April 6, 1954. (Seal.)

[fol. 598] STIPULATION RE DEPOSITION

The Deposition of R. L. Weakley, witness for the defendants in the above styled cause, called by the Complainant for further cross examination, at the offices of Walker & Hooker, Nashville Trust Building, Nashville, on May 25, 1951, at ten o'clock A. M., when were present Mr. William Waller for Complainant and Mr. K. Harlan Dodson, Jr., for the Defendants.

All formalities as to notice, caption and certificate are waived. Objections as to relevancy, competency or materiality of the testimony are reserved for the hearing.

It is agreed that the Court Reporter taking the deposition, being a Notary Public, may swear the witness and [fol. 599] sign his name to the deposition when the same has been transcribed.

DEPOSITION OF R. L. WEAKLEY—Filed July 25, 1951

Said witness, R. L. Weakley, being first duly sworn, deposed as follows:

Stipulation:

It is stipulated that Commissioner Evans reported as follows:

Re: Esso v. Evans

Memorandum—

Commissioner Evans reported that he has made a further search and does not find any file in the Commissioner's office in which there is any letter, memorandum, or other document relating to the subject of taxation or government-

owned aviation gasoline during the years 1943-1946. Specifically he has found no file containing a letter or ruling in connection with storage facilities at Nashville, Tennessee, under the name of Ingram or River Petroleum Corporation or anyone else, and he has found no file containing letters or copies of letters, photostats of which have been filed as Complainant's Exhibits 50, 51 and 52, purporting to be correspondence between Commissioner McCanless and William Waller, attorney for Standard Oil Company of Louisiana, or containing copies of contracts between Standard Oil Company of Louisiana and the United States Government referred to in such correspondence. Commissioner Evans further reported that he has consulted Mr. Weakley and finds that Mr. Weakley does have his own file relating to the years in question.

[fol. 600] Further cross-examination.

By Mr. Waller, for Complaint:

Q. I believe you have brought with you the file that you personally kept in 1943 and subsequent years during the war, relative to Government-owned aviation gasoline?

A. Do you mean, correspondence with the Standard Oil Company with reference to that?

Q. Yes, correspondence with the Standard Oil Company, or with any officials of the State of Tennessee or employees of the State of Tennessee.

A. Yes sir.

Q. That, I believe, is a file that you kept in your office and is distinct from any file that may have been kept by Commissioner McCanless?

A. Yes sir.

Q. In that file did you find a ruling or letter or memorandum relative to the taxability or nontaxability of Government-owned aviation gasoline, stored at certain tankage in Nashville, Tennessee, which has been referred to in this record as the Ingram or Spinning Company tankage?

A. No sir.

Q. Did you make a search to find any such memorandum or ruling or letter, if it existed?

A. I searched through the files, but I did not search for

that particular thing. I think I would have seen it if it had been in there.

Q. And you are satisfied there is no such letter or ruling or document?

A. Yes sir, I am.

[fol. 601] Q. Did you find in your file a letter that I, as attorney for the Standard Oil Company of Louisiana, wrote you on February 23, 1943, being the original of Complainant's Exhibit No. 53?

A. Yes sir.

Q. I will ask you if you will file a photostat of that original letter as Complainant's Exhibit No. 54?

A. Yes.

(Photostat of said letter to be made Complainant's Exhibit No. 54.)

Q. Did you find in your file any reply to that letter, or any memorandum or document of any kind in connection with that letter?

A. No sir.

Q. Is that the first letter or document that you found in your file relating to the subject of Government-owned aviation gasoline being stored in Tennessee?

A. No sir.

Q. What earlier letter or document did you find?

A. The first thing I found was a letter from George S. Hale, an examiner out of my office.

Q. Will you produce that letter?

A. Mr. Dodson has it, I believe.

(Letter produced.)

Q. You have produced a typewritten letter, or a copy of a letter with a typewritten signature, dated July 19, 1943, with a caption, "Re: Commingling of Company-owned and Government-owned gasoline," and with pencil notation, [fol. 602] "Orig delivered to Com. McCanless"?

A. Yes sir.

Q. That is the document to which you refer?

A. Yes sir.

Q. While you said that came before the letter from me to you, dated February 23, 1943, you will notice that it really came later, being dated July 19, 1943; that is correct?

A. Well, the dates will show. I had in mind that this was the year prior to the date of your letter. One of them was—— This was what year?

Q. My letter was February 23, 1943 and Mr. Hales's letter was July 19, 1943.

A. Well, I was mistaken in that; I thought yours was in 1944.

Q. I will ask you, Mr. Weakley, in order to make the record complete, if you will file a photostat of the document you have just produced as Complainant's Exhibit No. 55?

A. Yes sir.

(Photostat of document to be filed as Complainant's Exhibit No. 55.)

Q. In chronological order, what is the next letter or document or memorandum you find in your file relating to this subject?

(Letter is produced.)

Q. You have produced, Mr. Weakley, what purports to be a copy of a letter from Commissioner McCanless to me, [fol. 603] dated August 11, 1943 and in the top right hand corner, in red pencil, there is a notation "Mr. Weakley"; in other words, that is a signed copy of a letter to me which Mr. McCanless furnished to you?

A. Yes sir.

Q. Will you file a photostat of that document as Complainant's Exhibit No. 56, and, for the benefit of the Court, I will call attention to the fact that the original of that letter is filed as Complainant's Exhibit No. 50?

A. I will, yes sir.

(Photostat to be made Exhibit No. 56, Complainant's Exhibit.)

Q. Did you find in your file the originals of Complainant's Exhibit No. 51 and Complainant's Exhibit No. 52, being my letters of September 16, 1943 and October 15, 1943, respectively, addressed to Commissioner McCanless, complying with the request made in his letter to me?

A. No sir, I did not find them.

Q. Did you find in your file the service contracts requested by Commissioner McCanless?

A. No sir.

Q. What is the next document, in chronological order, that you found in your file?

(Witness produces paper.)

Q. You have produced, Mr. Weakley, what purports to be a carbon copy of a letter dated October 29, 1943, addressed to Standard Oil Company of Louisiana at Memphis, attention Mr. H. E. DeSaix, and evidently written for your sig- [fol. 604] nature by a gentlemen with the initials "G.S.H."?

A. Yes sir.

Q. Will you file a photostat of that document as Complainant's Exhibit No. 57?

A. Yes sir.

(Document to be marked Exhibit No. 57, Complainant's Exhibit No. 57.)

Q. Who is "G. S. H."?

A. George S. Hale, Jr.

Q. The same Mr. George S. Hale previously referred to?

A. Yes sir.

Q. I hand you what purports to be the original of that letter, on the stationery of the Department of Finance and Taxation, with a number of documents thereto attached, including a description of Exhibit A, Exhibit B, Exhibit C, Exhibit D. Exhibit E and Exhibit F, all of which exhibits are attached, and will ask you if that is the letter and if those are the documents attached to that letter which were sent to the Standard Oil Company of Louisiana on October 29, 1943, "Attention Mr. H. E. Desaix"?

A. (Examining papers.) Yes sir.

Q. Will you file the letter and the attached documents as Complainant's Exhibit No. 58?

A. Yes.

(Letter and attached documents, six in number, as Complainant's Collective Exhibit 58.)

Mr. Waller: With the understanding that we may substitute photostats for the originals?

Mr. Dodson: Yes.

A. Yes.

[fol. 605] Q. Prior to returning these documents to Mr. DeSaix, had not you and Mr. J. D. Wallis and Mr. Hale, that is, Mr. George S. Hale, Jr., gone to Memphis for the purpose of satisfying yourselves as to the accounting methods used by Standard Oil Company of Louisiana in keeping Government-owned aviation gasoline separate in the accounts and reports from Company-owned aviation gasoline?

A. I don't remember that I ever did and I don't remember that they did, but I might have sent them. I believe if I had gone, I would remember it.

Q. What is the next letter or document in chronological order which you find in your file?

(Witness produces paper.)

Q. You have produced a typewritten copy, or a carbon copy, of a letter of December 16, 1943, written by you to Standard Oil Company of Louisiana; I will ask you if the original of that letter, with your signature, is not the letter which is filed in this record as Defendant's Exhibit No. 4?

A. Yes sir, it is.

Mr. Dodson: Yes, I have checked it.

Mr. Waller:

Q. What is the next letter or document or memorandum which you find in your file?

(Witness produces paper.)

Q. You have produced a typewritten copy, or a carbon copy, of a letter dated December 29, 1943, addressed to Standard Oil Company of Louisiana, attention Mr. H. E. [fol. 606] DeSaix, and purporting to be signed by J. C. Greene, Supervisor Examiner and I will ask you, Mr. Weakley, if that is not a copy of the letter, of which the original was filed as Complainant's Exhibit No. 47?

A. Yes sir.

Q. What is the next letter or document?

(Witness produces paper.)

Q. You have produced a letter on the stationery of Standard Oil Company of Louisiana, written from Memphis, Tennessee and dated December 30, 1943, addressed to the

Department of Finance and Taxation, attention Mr. J. C. Greene and signed by Mr. R. J. Ringger, Office Manager, with the initials "H. E. D.", and I will ask you if that is not the original letter, of which a carbon copy has heretofore been filed as Complainant's Exhibit No. 48?

A. Yes sir.

Q. Since this is an original, Mr. Weakley, I will ask you if you will not file a photostat of that original?

A. Yes sir.

Q. As Complainant's Exhibit No. 59?

A. Yes sir.

(Photostat to be marked Complainant's Exhibit No. 59.)

Q. What is the next letter or document you found in the file?

A. That is all we have found.

Q. Now, did you take these letters out of a larger file, or was that a separate file?

[fol. 607] A. Yes sir, I took them out of a larger file.

Q. And there was nothing in that larger file which related to the subject of this Government-owned aviation gasoline?

A. No sir. We have the file here.

Mr. Dodson: Let the record show that the file was produced for the examination of Mr. Waller.

Mr. Waller:

Q. This file relates, I believe, Mr. Weakley, to gasoline tax matters in general and not merely to any aviation gasoline?

A. That is right, we had no file relating to aviation gasoline; it was just kept in the general file.

Q. Mr. Weakley, the file which you have produced and which I have hurriedly thumbed through, has a tab on it, "Standard Oil Company, 1943"; in other words, this file relates only to matters between the Department, or between the Gasoline Tax and Inspection Fee Division, Department of Finance and Taxation, and the Standard Oil Company of Louisiana, during the calendar year 1943?

A. Yes.

Q. But you have made a search of other files to determine whether or not there was anything in them along the lines I have previously questioned you about?

A. Yes sir, that is correct.

Q. And found nothing but routine correspondence?

A. Yes sir, that is correct.

Q. In other words, when I say routine correspondence, [fol. 608] I mean correspondence of the same character as that involved in this 1943 Standard Oil Company file, and about gasoline tax matters in general?

A. Yes sir.

Q. I do notice in this file a letter, or carbon copy of a letter dated March 29, 1943, to Standard Oil Company of Louisiana at Memphis, apparently signed by J. C. Greene, Supervisor Examiner and a reply from the Standard Oil Company, dated April 6, 1943. I will ask you if you will file a photostat of the March 29, 1943 letter as Complainant's Exhibit No. 60 and a photostat of the reply, dated April 6, 1943, as Complainant's Exhibit No. 61?

A. Yes.

(Photostats to be marked, respectively, Complainant's Exhibits Nos. 60 and 61.)

Q. To clarify the matter on the record, Mr. Weakley, of course, the correspondence speaks for itself, but you were inquiring about three railroad cars and in connection with the last one, namely, U. T. L. X. 52740, the subsequent correspondence shows that that contained asphalt instead of gasoline; that is correct, isn't it?

A. Yes sir.

Q. You have also produced at my request, Mr. Weakley, Inspectors' Reports on Form IF4A, relating to aviation gasoline shipped to Tennessee Oil Company during the months of January, February and March, 1944?

A. Yes sir.

Q. Each of those IF4A forms has attached a number of IF4B forms?

[fol. 609] A. Yes sir.

Q. I don't care anything about the IF4B forms, but I would like to ask you, if you will file photostats of the IF4A forms that you have produced in chronological order, as Complainant's Exhibits Nos. 62, 63, 64, 65 and 66?

A. Yes sir.

Mr. Dodson: Just the first page?

Mr. Waller: Yes.

A. Yes sir.

Q. Those forms have the signatures of Joe Holbrook and T. B. Bunn, or one of them?

A. Yes sir.

Q. Who were those gentlemen?

A. Inspectors, or State Inspectors.

Q. And they were located at Dresden, Tennessee?

A. Joe Holbrook was located at Dresden, Tennessee; Mr. Bunn was located at Dyersburg, Tennessee; but in the case of unloading barges, Mr. Holbrook went over and assisted Mr. Bunn.

Q. And they were inspectors employed by the Gasoline Tax and Oil Inspection Division?

A. They were what is known as "State Coal Oil Inspectors."

Q. I notice, Mr. Weakley, that on some of these forms, or, I should say, two of them, under the caption, "who is liable for tax"; there is the notation, "U. S. Army." On two of them there is the notation "Tax free" and on one of them there is the notation "Exempt".

[fol. 610] A. The Department doesn't assume any responsibility for what a Coal Oil Inspector puts on anything, except figures.

Q. Was all of that gasoline handled in the same way; in other words, was there any significance in the fact that there is a notation, in two cases, "U. S. Army", in two other cases, "Tax free", and in one case, "Tax Exempt"?

A. So far as I know, it was all exactly the same kind of operation.

Q. And was that Government-owned aviation gasoline handled by the Tennessee Oil Company under service contracts with the United States Government?

A. As I understand it, it was, yes sir.

Q. Did the State of Tennessee collect or make any assessment of gasoline tax on any of that gasoline during the year 1944, or in any subsequent year, prior to the commencement of the present litigation?

A. No sir.

Mr. Waller: That is all.

Redirect examination.

By Mr. Dodson, For Defendant:

Q. Mr. Weakley, did you, or, so far as you know, any other supervisory official of the Department of Finance and Taxation, direct Mr. Bunn and Mr. Holbrook, or Mr. Bunn or Mr. Holbrook, that gasoline handled in this manner was tax exempt?

A. No sir.

[fol. 611] Q. Was there ever a reply, of which you have any knowledge, to Mr. Waller's letter of February 23, 1943, the original of which has been filed as Complainant's Exhibit No. 54?

A. Not that I can find any record of, or can remember.

Q. Do you know why there was no reply to that letter by you; it was addressed to you, was it not?

A. Yes sir. The reason I never did reply to it was because it never was determined as to whether or not the State would proceed to collect the tax on that gasoline. From the letter, I saw that the Attorney General received a copy of it and I asked the Attorney General and Commissioner McCanless on some few occasions about this matter and we never arrived, or they never arrived at a conclusion about this matter, to instruct me what to do.

Mr. Waller: I want to note an objection to Mr. Weakley's testimony as to whether Commissioner McCanless and Solicitor General Barry arrived at a conclusion, for the reason that that could not possibly be within his knowledge and his testimony must necessarily be hearsay.

Mr. Dodson:

Q. Were you ever advised by Commissioner McCanless or by the Attorney General's office of this State as to any decision by them or any ruling by them?

A. No sir. I would like to add, for the benefit of those two gentlemen, that I don't think that that was any intent of evasion; I think they never arrived at a conclusion.

Mr. Waller: I note the same objection, that that is a conclusion of the witness which is irrelevant and immaterial.

[fol. 612] Mr. Dodson:

Q. Now, Mr. Waller has asked you about any ruling that you might have any knowledge of, or any writing pertaining to the storage of gasoline at Nashville, I believe by the Ingram Spinning Company,——

A. Yes.

Q. Or, whoever it was. Insofar as you know, was there ever any written ruling given on that?

A. No sir.

Q. You never did see any such ruling?

A. No sir.

Q. You never did hear of any such ruling?

A. No sir.

Q. Whenever rulings were made respecting liability or non-liability for gasoline taxes, what was the customary procedure of the Department of Finance and Taxation with respect to furnishing you copies of the same?

A. Mr. Dodson, most times, things of that kind had been handled by the Commissioner and myself and Attorney General and myself by discussing the matter and then they advising me what to do. There never was much correspondence on the matter. I never asked the Attorney General for written opinions, rarely ever, because I had confidence in him and if he told me, I went ahead.

Q. Now, with respect to these two matters, were you advised by the Attorney General's Office?

A. No sir.

Q. Or by Commissioner McCanless?

[fol. 613] A. No, nor by Commissioner McCanless.

Q. What correspondence files, other than the 1943 file, correspondence file, in your office was examined to obtain material, or any similar material, to that which you have exhibited?

A. 1942, 1943, 1944 and, I think, 1945.

Q. Mr. Waller, in examining the file, has asked you to file as Complainant's Exhibits No. 60 and 61, correspondence between J. C. Greene and the Standard Oil Company of Louisiana, the letters being dated March 29, 1943, and April 6, 1943. Did those letters pertain to the storage of gasoline?

A. No sir, I don't think so. I wouldn't know, unless

these exhibits—I get sort of mixed up on them—if you would read them to me, I would be able to tell.

(The letters referred to in the question were read to the witness.)

A. I don't know whether he was referring to it as storing. It might be better if I would explain our operations on things of that kind.

Q. All right, sir.

A. We received the railroad report on each month from each station and the railroad report shows where cars originated and where they are—and to whom they are delivered and Mr. Greene, evidently, from his railroad report, saw these cars which Standard did not pay on, and that is the purpose for writing the Standard Oil Company and on the supposition, as is usually the case, that whoever they are [fol. 614] billed to, stores them, whoever the Railroad company delivers them to, stores them and since the tax is paid on receipts and storage, they owed the tax.

Recross-examination.

By Mr. Waller:

Q. Where is Warcer, Tennessee?

A. Warcer is a pipeline terminal about twelve miles out of Knoxville, Tennessee.

Q. And that is the point at which aviation gasoline for use at Knoxville was generally received?

A. Yes, generally received, yes. It is also received by Gulf and Texas at the River Terminals, or by tank car.

Q. Mr. Weakley, I believe you state that you did not direct Mr. Bunn and Mr. Holbrook to make these notations that we have referred to on the Form IF4A Inspectors' Reports?

A. No sir.

Q. Did you state to them, one way or the other, what to do about this Government-owned aviation gasoline?

A. I am not sure that I did or didn't. There is a letter in the record as an Exhibit that I wrote to somebody about what to do about that.

Q. You have reference, I believe, to the letter to J. O. Johnson at Memphis, Tennessee, Defendant's Exhibit No. 3, do you not, Mr. Weakley?

A. Well, probably so. If there is not one in there to the other folks, I did not write them.

Q. You told Mr. Johnson to mark the reports in some [fol. 615] way to identify the quantities received in the tanks for the use of the United Stafes Government as tanks used exclusively by the United States Government, where that was the case?

A. Yes sir.

Q. Did you tell these Inspectors, Mr. Holbrook and Mr. Bunn, that this gasoline in question was subject to gasoline taxes?

A. I didn't write them that; I think I did.

Mr. Dodson: Think you did what?

A. I think that I notified them to be careful to show all this gasoline that came in and on which the tax was not paid at the time, in order that we would know what to look for if we decided to bill it. In other words, it had not been determined whether it was taxable or not taxable.

Q. You think that you made an explanation of that kind to Mr. Bunn and Mr. Holbrook?

A. I think I talked to them on the telephone about that, Mr. Waller.

Q. Did you ever talk to them in Dyersburg or in Dresden about it?

A. Not that I remember.

Q. Now, you said that the reason you did not reply to the letter of February 23, 1943, Complainant's Exhibit No. 54, was that you were not definitely advised by the Commissioner or by the Solicitor General, or words to that effect, as I recall them. I will ask you, Mr. Weakley, if you have any recollection of talking with or having discussed the matter orally with me, in the presence of Gen. Barry?

[fol. 616] A. No; I do not.

Q. And if such a discussion was had, you made no memorandum of it?

A. If that was had, I made no memorandum of it.

Q. And you now have no recollection of it?
A. No sir.

Further this deponent saith not.

R. L. Weakley, by R. H. Maxson, Reporter.

Sworn to before me when taken, May 25, 1951. R. H. Maxson, Notary Public at Large, State of Tennessee. (Seal.)

[fol. 617] DEPOSITION OF H. E. DESAIX—Filed July 24, 1951

H. E. DESAIX, being first duly sworn, deposed as follows:

Direct examination.

By Mr. Waller:

Q. This is Mr. H. E. Desaix?
A. That is right.
Q. Where do you live, Mr. Desaix?
A. Memphis, Tennessee.
Q. By whom are you employed and in what capacity?
A. I am the head of the tax department of the Tennessee-Arkansas Division of the Esso Standard Oil Company.
Q. How long have you held that position?
A. That position I have held since November, 1949.
Q. How long have you been employed by the Esso Standard Oil Company or its predecessors, which I include Standard Oil Company of Louisiana?
A. Twenty-six years.
Q. What position did you hold in 1943 and 1944?
A. I was tax clerk in the accounting department of the Standard Oil Company of Louisiana.
Q. Is that at Memphis?
A. At Memphis.
Q. In the answer filed in this case there is a statement to the effect that "On at least one occasion complainant's agent was informed that he must make a complete report showing all such gasoline stored"—referring to govern-
[fol. 618] ment-owned aviation gasoline—"because the De-

partment did expect at some future date to collect the privilege taxes and inspection fees incurred by the complainant as the result of its storage of the gasoline." Assuming you were the complainant's agent referred to, were you given any such information by the Department of Finance and Taxation or by anyone on its behalf?

A. We received a letter in December 1943 asking us to make a monthly report of the aviation gasoline received that belonged to the Government but nothing was said in that letter that it would be subject to tax or inspection.

Q. Is the letter to which you have reference dated December 16, 1943 signed by R. L. Weakley and filed in this record as Defendant's Exhibit 4?

(Handed Witness.)

A. Yes sir, that is the letter.

Q. Mr. Desaix, do you recall during 1943 having been in Mr. J. C. Green's office, Mr. Green being an employee of the Department of Finance & Taxation?

A. Yes sir, I was there in August, 1943.

Q. What was the purpose of your visit?

A. It was in connection with the matching of the gasoline rationing reports with the distributor's gasoline report.

Q. Did your visit there have anything to do with the government-owned aviation gasoline being handled by the Standard Oil Company of Louisiana?

A. No sir.

Q. Do you recall any remark being made at that time by Mr. Weakley either a jocular remark or any other remark to the effect that somebody might have to pay some tax sometime on this government-owned aviation gasoline?

[fol. 619] A. No sir, I recall no such remark.

Q. Do you recall any such remark by him at any other time?

A. No sir.

Q. Do you recall having been in Mr. Green's office during the period referred to, 1943 or 1944 on any other occasion than the one you mentioned?

A. Not in Mr. Green's office, no sir. I may have stopped to say, "How do you do" to them as I went to see Mr. Weakley on some other business.

Q. Did Mr. Weakley come to Memphis at any time in connection with the government-owned aviation gasoline?

A. Yes sir, he did.

Q. And when and with whom?

A. It was in the summer of 1943, I can't fix the exact date, but I can place it between June and October. He was accompanied by Mr. Wallis and a Mr. Hale.

Q. Is that Mr. J. D. Wallis?

A. Yes sir, an elderly gentleman.

Q. And Mr. G. S. Hale, Jr.?

A. I believe that is the gentleman, his first name is George.

Q. I show you Complainant's Exhibit 58 which consists of a letter dated October 29, 1943, written to Standard Oil Company of Louisiana to your attention and signed R. L. Weakley with the initial "H." to which letter there are certain documents attached and I will ask you if you received that letter.

(Handed witness.)

A. Yes sir, we did.

Q. Did that letter have any connection with the visit [fol. 620] by Mr. Weakley and Mr. Wallis and Mr. Hale that you have referred to?

A. It did.

Q. I notice some documents are being returned to you. When did they obtain those documents?

A. On the occasion of their visit.

Q. Tell Mr. Desaix, what the visit was about and how Mr. Weakley or his assistant obtained possession of the documents which were returned to you with Mr. Weakley's letter of October 29, 1943.

A. When they came to the office of course they must have gone to either Mr. Ringger, the office manager, or Mr. Walker, the assistant office manager, they wouldn't have come to me direct, and they stated that the purpose of their visit was to review the records we were keeping of government aviation gasoline.

Q. For what purpose?

A. To see that it was properly being accounted for or our record was available which would show how it was being accounted for.

Q. Was some of this gasoline being comingled with commercial gasoline owned by the company?

A. Yes sir.

Q. Did they ask to see the records as to how this gasoline, these two types of gasoline, were separated on the accounting records of the company?

Mr. Cummings: I understood the witness to say they must have talked to somebody else.

[fol. 621] By Mr. Waller:

Q. I am only asking about what they told you.

A. What was that last question?

(The question was read by the reporter.)

By Mr. Waller:

Q. I mean by that, Mr. Desaix, the government-owned gasoline and the commercial gasoline.

A. The records were not kept in my department, Mr. Weakley introduced the two gentlemen to me after seeing the office manager, and I took them to the stock department where the records were kept and Mr. Weakley said he would leave his two men there to review the records and get what information they needed.

Q. What was the nature of the information they wanted?

A. To see what quantities of government aviation gasoline was being brought in, where it was being shipped to, and what records we were maintaining of the incoming movements and outgoing movements.

Q. How did these gentlemen then happen to obtain the documents which were returned to you with the letter of October 29, 1943, did you furnish those documents to them?

A. Yes sir, this gave them a complete example I guess you call it, of a month's accounting of all the gasoline, of the stock summary showing opening inventory, receipts and disbursements, and closing inventory and we gave them a sample of the ledger sheet and a sample of the State Inspector's report of an incoming receipt and a copy of a summary of disbursements made to one of the government

[fol. 622] agencies and a copy of one of the shipments covering one of the disbursements on the summary.

Q. Did they ever express any dissatisfaction with the records or manner of keeping the records?

A. No sir.

Q. Did you hear anything further about the matter after receiving these exhibits back with the letter of October 29, 1943?

A. No sir, that was the last I heard of it.

Q. Mr. Desaix, there is one letter that you furnished me that Mr. Weakley didn't show a copy of in his file probably because it is of a later date than the file he produced and to make this record complete, I will ask you if you did receive a letter dated February 29, 1944 from Mr. Green which referred to aviation gasoline?

A. Yes sir, we received that letter.

Q. I will ask you if you will file that photostat of that as Complainant's Exhibit 67?

A. Yes sir.

(Document referred to above marked Complainant's Exhibit No. 67, Witness Desaix, and filed in evidence.)

Q. I notice that refers, Mr. Desaix, to a car of aviation gasoline consigned to Vultee Aircraft Corporation and the statement is made that that corporation is not a branch of the U. S. Government and not entitled to an exemption of the tax. What did your investigation show about that?

A. The investigation showed that the gasoline was [fol. 623] shipped to Vultee from the Baton Rouge Refinery and due to a misunderstanding between our Sales Department and Vultee the tax was not paid, it was company-owned gasoline.

Q. Was the tax subsequently paid?

A. It was paid, yes sir.

Q. As the result of that letter?

A. Yes sir.

Mr. Waller: That is all.

Mr. Dodson: No questions on behalf of the Defendant.

Further deponent saith not.

Mr. Cummings: Let the record show no further cross examination of Commissioner Evans by Mr. Waller.

H. E. Desaix, by Kelley R. Hix, Reporter.

Sworn to before me when taken. Kelley R. Hix, Notary Public, State at Large. My Commission Expires April 5, 1954. (Seal.)

[fol. 624] STIPULATION RE DEPOSITION

The deposition of James Clarence Evans, taken by consent at the offices of Waller & Hooker, Nashville Trust Building, Nashville, Tennessee on May 10, 1951 beginning at two o'clock P. M. to be read as evidence on behalf of the Defendants in the above-styled cause.

All formalities as to notice caption and certificate are waived. Objections as to relevancy, competency and materiality of the testimony are reserved for the hearing.

It is agreed that the court reporter taking the deposition, being a notary public, may swear the witness and sign the name of the witness to the deposition when transcribed.

[fol. 625] DEPOSITION OF JAMES CLARENCE EVANS—Filed July 25, 1951

JAMES CLARENCE EVANS, Being first duly sworn, deposed as follows:

Direct examination.

By Mr. Dodson:

Q. This is Mr. James Clarence Evans?

A. That is correct.

Q. Mr. Evans, what is your present capacity with the State of Tennessee?

A. My official position is Commissioner of Finance and Taxation.

Q. How long have you been in that position?

A. Since January 17, 1949, I believe it was.

Q. Mr. Evans, shortly after coming into that office, did you become familiar with the wartime storage of gasoline at Memphis, Tennessee by the Standard Oil Company or the Esso Standard Oil Company?

A. Yes sir, it was called to my attention.

Q. By whom?

A. By Mr. Weakley, who is the Director of the Gasoline Tax Division of the Department.

Q. That is Mr. R. L. Weakley who has previously testified?

A. That is right.

[fol. 626] Q. And when it was directed to your attention by Mr. Weakley, what then did you do if anything?

A. After discussing the facts with him I examined the files of the Commissioner's office and inquired of the Attorney General's office, in fact I believe I inquired of Mr. Waller, the attorney for Standard Oil, whether anyone had any information or any letter or any ruling that would throw light on what action if any had been taken with respect to tax liability on this gasoline involved in the Memphis matter.

Q. What was the result of your investigation? First, respecting the files in your office, the Commissioner's office?

A. I found nothing in the Commissioner's files to indicate that there had ever been any ruling or any position at all taken in the matter.

Q. And what did you find if anything with respect to the Attorney General's office of the state?

A. The Attorney General's office, first I wrote a letter to the Attorney General inquiring about the question, that is, as to whether or not they had any records that would indicate that there had been an official position taken and I received a reply from him, a copy of which I believe is here and the best way to handle that is simply file that reply.

Q. You refer to W. F. Barry, the Solicitor General?

A. That is correct.

Q. Will you file that as Defendant's Exhibit No. 5, with the understanding that if we later desire to do so we may substitute a photostat in lieu of the original?

A. That is all right.

[fol. 627] Mr. Waller: No objection to the substitution of the photostat. However, we reserve objections to the letter on the ground it is hearsay and any other objections that we may be entitled to make on the hearing.

Also, I think I should object to it on the additional ground at this time that it purports to be a reply to a letter written by Commissioner Evans which has not been offered.

(Letter referred to above marked Defendant's Exhibit No. 5, Witness Evans, and filed in evidence.)

By Mr. Dodson:

Q. The red pencil notation on the left margin of the first page, "Gamble—note—lets discuss, J.-C. E." That is your own notation?

A. That is my own inner office scrawl addressed to the then Assistant Commissioner Gamble.

Q. That purports to be a reply to a request from you dated October 26, Commissioner, I believe?

A. Yes.

Q. I want to ask you if you can identify that as being your request to the Attorney General's office?

A. That is a carbon copy of it, I believe that is my office file copy.

Q. You of course do not have the original?

A. No sir, that is in the Attorney General's files.

Q. Will you make that Exhibit 6 to your deposition, that copy?

A. Yes sir.

(Copy of letter referred to marked Defendant's Exhibit No. 6, Witness Evans, and filed in evidence.)

[fol. 628] Q. With the same understanding respecting photostat and the same understanding respecting the objections reserved—Mr. Evans, insofar as you could ascertain, were the files of the Commissioner's office apparently complete?

A. Yes sir, I don't want to leave any misunderstanding at all about that, I don't intend to infer in any way there is anything missing from the files or they had been robbed or anything of that sort, I examined them and saw nothing

to indicate there had been anything taken from the files and I saw nothing to indicate there had been anything, at least in writing, giving a ruling or taking any position at all on this situation.

Q. And as a result of that conclusion, what did you then do?

A. After the correspondence and inquiries and some discussion about it I finally had an assessment made, an assessment based on computations which Mr. Weakley and his office personnel computed together with and in conjunction with, I believe Mr. Gamble helped, the Assistant Commissioner, helped them of it or at least checked them.

Q. And after that assessment was made, the money was paid under protest by the Complainant and this suit filed?

A. That is correct.

Q. Commissioner, has anyone raised any question on behalf of the Complainant with respect to the computation itself?

A. With respect to the mathematical computations and their accuracy and being based on actual factual shipments [fol. 629] and so on and storage, there has been no question raised to my knowledge. As to the tax liability of course there has.

Q. A very definite question about that?

A. Yes sir.

Mr. Dodson: That is all.

Cross-examination.

By Mr. Waller:

Q. Mr. Evans, in connection with your letter of October 26, 1949 to Solicitor General Barry, Defendant's Exhibit No. 6, I believe Mr. Barry is still the Solicitor General of the State of Tennessee, is he not?

A. That is correct.

Q. And he lives in Davidson County and is in good health and is available?

A. I agree with all your question except he is available. I don't know what you mean by that. He is actively engaged in the performance of his duties as Solicitor General.

Q. He is still available as a witness if you wanted to call him?

A. Oh yes.

Q. He is in town, I mean?

A. Right now he is on vacation, I believe, I don't know where he is right now.

Q. Whether he is here today or not, he is generally here?

A. He is generally available, yes sir.

Q. You haven't personally searched General Barry's files and records of course?

[fol. 630] A. No sir, I have not. I haven't personally searched any files in the Attorney General's office.

Q. In this letter you mention that on behalf of Standard Oil Company of Louisiana or the Esso Standard Oil Company, I furnished you letters or copies of letters indicating that copies of the contract between the Government and Standard pertaining to this gasoline in question were furnished to Commissioner McCanless. Did you examine Commissioner McCanless' files to see if you could find any letters transmitting those contracts?

A. I examined all the files that were in the office of the Commissioner of Finance and Taxation. If Mr. McCanless has any other files he might have taken with him when he ceased being Commissioner, I don't know anything about it and have no idea he did do that.

Q. Have you read Mr. McCanless' testimony in this case?

A. I have not. Mr. Waller, in connection with that search of files in my office let me make it plain on the files that my secretary, who incidentally was there when Mr. McCanless was Commissioner, on the files those girls brought to me that they thought might possibly throw some light on this, I personally examined them, I didn't physically open every file in the office of the Commissioner of Finance & Taxation. A thorough search and a genuine search was made under my direction.

Q. You did not personally make any search for files but only examined the files that were given to you by the girls in the office?

[fol. 631] A. That is correct. And all files in the office were in the filing cabinets they went through.

Q. Mr. Evans, I show you Complainant's Exhibits 50, 51, and 52 purporting to be correspondence between Commissioner McCanless and me regarding the contract in

question and will ask you if you found in any of the files you examined those letters or the carbon copies of those letters?

A. No sir. Wait a minute. Let me look at each one of them. Exhibit 50 I did not. 51 I don't think I did. 52 I don't believe I did. As I recall, the first that I saw of those three letters, 50, 51 and 52, they or copies of them were supplied by Mr. Waller when he first inquired about this matter.

Q. Then if there is a file concerning those letters or the carbon copies of them, you were not furnished that file and did not examine it?

A. I wasn't furnished any file that had those letters in them, no sir, I don't think there is any such file in my office.

Q. You will note that Complainant's Exhibit No. 51 purports to transmit to Commissioner McCanless one Army service contract and one Navy service contract. Did you find either of those contracts in any file you examined?

A. No sir.

Q. You will note that Exhibit No. 52 purports to transmit another Navy contract and an extension of the Army contract which had been transmitted in the previous letter, did you find either of those documents?

A. No sir.

[fol. 632] Q. Did you personally examine Mr. Weakley's files?

A. As best I recall, I didn't make any search of the files down in Mr. Weakley's office. I did inquire of Mr. Weakley and instructed him to make a search. In fact, I grilled him very thoroughly about what he knew and remembered about this whole question.

Q. In your letter to Solicitor General Barry of October 26, 1949, Defendant's Exhibit No. 6, you refer to a letter addressed by me to Mr. Weakley dated February 23, 1943. Did Mr. Weakley furnish you the original of that letter or show you the file in which he had placed that letter?

A. The best I remember he did not. I refer to that letter because I had received a copy of it from Mr. Waller is the way I recall it.

Q. But you have never seen the file of the Department of Finance and Taxation in which the original of that letter was placed?

A. I don't know what file that was, I have never seen that letter in a file in the Department.

Q. And if there is such a file that is not one of the files you examined?

A. No sir.

Q. Mr. Evans, in your discussions with Mr. Weakley I presume some mention was made of the handling of government-owned gasoline in certain tanks in West Nashville owned by the Ingram Spinning Company?

A. There was discussion of gasoline in storage facilities here in Nashville, I don't know who owned them, I don't know that Mr. Weakley ever told me. It was my under- [fol. 633] standing he did tell me they were facilities which were under lease to the government and the government was storing gasoline as lessee in its own facilities.

Q. Did he furnish you or show you or did you find a letter or written ruling to the effect that government-owned gasoline handled in those tanks was not subject to the Tennessee Gasoline Tax and Inspection Fee?

A. Mr. Weakley told me, I don't know, I wouldn't say he did or didn't show me anything in writing, that at the time, that is back during those war years, the Department did take the position and he or Mr. McCanless or somebody advised those people that if the tanks were, the facilities at hand and tanks were leased to the government and the government, a lessee, was storing in its own facilities the Department didn't think there was any liability.

Q. I am asking about a letter or written ruling of the type you were looking for in connection with the Standard Oil storage at Memphis, was there any such letter or written ruling regarding those tanks?

A. I never made any search for any such letter or ruling. I don't recall whether Weakley ever told me there was one or not, I had no occasion to search for that.

Q. May I ask if you will search, make the same sort of search for that as you did in connection with the Standard Oil Company situation and if there is any such letter or written ruling produce that so it can be filed as an exhibit in this record?

A. I will be happy to do that. Give me again the name of the company who owned the facilities.

[fol. 634] Q. I rather you would get that from Mr. Weakley. We have on file in this case Defendant's Exhibit No. 1 which indicates that the contract with the Government was made by the River Petroleum Company covering those West Nashville tanks. If there is a ruling under the name of Ingram or River Petroleum or anyone else regarding those particular tanks I would like to get it so it may be filed. For the benefit of counsel and Court I will say, Mr. Evans, the reason I am asking that is I want to find out whether or not there was any practice on the part of the Department of making written rulings in regard to gasoline tax matters. Mr. Evans, is there any way a taxpayer can, under the law of Tennessee that you know of, or any practice of the Department of Finance and Taxation, force the Department to give a written ruling on a tax matter, or is that within the choice of the Commissioner?

A. Not in any way other than as it might result from their right to written findings of fact and rulings on questions of law, under that law that was passed about two years ago, nobody seems to have used it yet, that is the only way I know of.

Q. The Act you refer to is an Act of 1949 or 1947?

A. 1949, it is subsequent to this; so at that time, if there was any way to get the written ruling I don't know what it was, to force it.

Q. Mr. Evans, the letter that I furnished you purporting to be a copy of a letter addressed by me to Mr. Weakley dated February 23, 1943 which you mentioned in your letter [fol. 635] to General Barry, Defendant's Exhibit No. 6, showed on its face, did it not, that a copy of it was sent to General Barry?

Q. To Mr. Weakley, not McCanless.

A. The photostat you hand me dated February 23, 1943 addressed to Mr. Weakley indicates a copy of General W. F. Barry, yes sir.

Q. Since that letter has been referred to in the Defendant's Exhibit No. 6, I will ask you, Mr. Evans, if you will file that photostat of my file copy of the letter which I have just handed you as Complainant's Exhibit 53?

A. Yes sir.

(Photostat of letter referred to above marked Complainant's Exhibit No. 53, Witness Evans, and filed in evidence.)

Q. In your investigation of the facts, Mr. Evans, did you find that the facts as outlined in this letter of February 23, 1943, Complainant's Exhibit 53, were correct and represented the method of handling of that gasoline throughout the period involved with the exception that the barging of the gasoline after the date of this letter was by common carrier instead of Standard Oil Company barges?

A. Mr. Waller, I can't give you a categorical answer to that question because there are an awful lot of facts wrapped up in this letter and a lot of conclusions of law too.

Q. Nothing occurs to you will the exception of the one point I mentioned that would be at variance with the facts [fol. 636] as stated in that letter, nothing occurs to you at this time and your attention hasn't been called to any variance, has it, Mr. Evans?

A. For example, Mr. Waller, in one paragraph you make the statement with respect to gasoline being shipped in by railroad tank cars. "It is my understanding that the State of Tennessee does not intend to collect the Tennessee gasoline tax and inspection fee on such gasoline." For example, about that I am not prepared to make a statement. I am not sure what the situation was on that, but with respect to this movement of gasoline up to the Memphis terminal, I believe the facts as set out here are substantially correct. Of course you refer to "All that Standard Oil Company of Louisiana has to do with it is pursuant to a service contract." I just rather the record in this case speak for itself about what the facts are.

Q. Did General Barry, so far as you know, examine his file in which his copy of this letter of February 23, 1943 was placed?

A. All I can say to that is there is a letter that is an exhibit to my testimony that General Barry wrote and speaks better for him than I can.

Q. And in that letter he said that he was unable to find anything directly in point upon this particular question?

A. That is in the letter, I believe.

Q. Ordinarily, General Barry handles suits for the State of Tennessee involving tax collections, does he not?

A. He is one of those who handles them.

[fol. 637] Q. The Attorney General's Department handles them ordinarily in most instances?

A. In practically all instances.

Q. Isn't the reason that the Attorney General's Department is not handling this particular litigation the fact that having taken a position on the matter in the war years as we refer to them, it seemed improper to the Attorney General's Department to change its position?

A. I am not prepared to say that they ever took a position on it. That letter I think from General Barry makes it plain they haven't taken a position. Why they didn't see fit or want to appear in this case, frankly has never been made specifically plain to me. They just thought it best they didn't do it. If there is a specific reason, I don't know what it is.

Mr. Waller: That is all.

Redirect examination.

By Mr. Dodson:

Q. Commissioner, from your examination of the files up there, which files were made up prior to the time that you became the Commissioner, wherever there has been any rulings or written opinions given to the Department of Finance and Taxation by the Attorney General's office, where is that kept?

A. When I came there the system was followed of filing an opinion in the file, the subject matter file. For example, that this particular correspondence and the factual situ-

[fol. 638] ation involved was filed in, or if it were a case of some importance and a separate file was made up it would be kept in that file. At that time there was not any file, loose leaf volume, or anything of that sort of Attorney General's opinions. We have tried to compile that since I have been there but it wasn't there at the time.

Q. When you were making your examination to which you have referred of the files there, and when you were making your request to the Attorney General's office, were you making an examination or request for any letters pertaining to the storage of gasoline at the Memphis terminal

or were you making an examination or request for any letters pertaining to the storage of gasoline at the Memphis terminal or were you making an examination and request for any waivers or any rulings on the question of tax liability?

A. I was looking for something that showed there had been an action taken or an answer to it or a definite ruling, not for the run of the mill correspondence about it.

Q. Would you examine your files to see whether or not the letters about which you have been asked on cross examination appear in any of those files?

A. Yes sir, I will again examine them.

Mr. Dodson: It would be satisfactory for him to give his answer to the reporter whether or not he can find it?

Mr. Waller: Yes sir, if he does find them I may want to ask him some questions.

[fol. 639] The Witness: As I remember, after Mr. Waller supplied me with these copies, we immediately tried to find them. I will examine the files in the Commissioner's office and have Mr. Weakley examine his files too.

Mr. Dodson: Let the record show that Commissioner Evans will make the further examination requested both by his counsel and by counsel for the Complainant on cross examination and furnish his answer to the reporter and that in the event the answer is negative, then there will be no further cross examination; but if it is of the affirmative, there may be.

Further this deponent saith not.

James Clarence Evans, by Kelley R. Hix, Reporter.

Sworn to before me at the time taken. Kelley R. Hix, Notary Public, State at Large. My Commission Expires April 5, 1954. (Seal.)

[fol. 640] STIPULATION RE DEPOSITION

The Depositions of George F. McCanless, R. L. Weakley, and Cletis Greene, taken by consent at the offices of Walker & Hooker, Nashville Trust Building, Nashville, Davidson County, Tennessee, beginning at 12:00 o'clock January 31, 1951, said depositions to be read on behalf of the Defendant in the above styled cause.

All formalities as to notice, caption, and certificate are waived. All objections are reserved to the hearing, except objections based upon the best evidence rule, or the form of the question. It is agreed that the court reporter, being a notary public, may swear the witnesses and subscribe their names to the depositions when transcribed.

[fol. 641] DEPOSITION OF GEORGE F. MCCANLESS—Filed July 25, 1951

GEORGE F. MCCANLESS, being first duly sworn, deposed as follows:

Direct examination.

By Mr. Dodson:

Q. State your name and present address?

A. George F. McCanless, Bank of Commerce Building, Morristown, Tennessee.

Q. Mr. McCanless, in what business or profession are you presently engaged?

A. I am in the practice of law.

Q. How long have you been practicing law, without interruption?

A. Since September 2, 1946.

Q. Prior to September 2, 1946, what were you doing?

A. I was Commissioner of Finance and Taxation of the State of Tennessee from April 23, 1939, until August 31, 1946.

Q. Mr. McCanless, you have no connection of any kind now, by employment, with the State of Tennessee, is that correct?

[fol. 642] A. That is true, except that my firm has been designated special counsel in some litigation which grew out of a strike in Hamblen County, my home county.

Q. And you have no connection of any kind, then, with the Department of Finance and Taxation?

A. No, I have not.

Q. From the period, from April 23, 1939, through August,

1946, you were continuously the Commissioner of Finance and Taxation of the State of Tennessee?

A. Yes sir.

Q. During that period of time, did you have any conferences with representatives of the Complainant, Esso Standard Oil Company, with respect to gasoline taxes due to be paid to the State of Tennessee?

A. Yes sir, I participated in many conferences.

Q. At the time did you have conferences at which representatives of the United States Government were present, along with representatives of Esso Standard Oil Company?

A. I cannot answer that question so positively as I did the previous one. I did participate in the conferences with representatives of the United States Government which related to gasoline taxes, and as I said, I participated in conferences with representatives of the Standard Oil Company of Louisiana and Esso Standard Oil Company, its successor, but I can't from independent recollection say that I participated in conferences in which both were represented.

Q. Did you have any conferences with either the repre-[fol. 643] sentatives of Esso Standard Oil Company, or the representatives of the Federal Government, or both, respecting the storage of gasoline belonging to the Federal Government in the tanks belonging to Esso Standard Oil Company, the Complainant, at Memphis, Tennessee?

A. I can't answer that I did. I think it is most likely that I did, but I don't remember any conferences which I attended in which that subject was discussed, though it may have been. I think likely that it was.

Q. You were the Administrative Head of that Department?

A. Yes sir.

Q. What was the attitude of the Department, the ruling of the Department, in January, 1944, respecting gasoline stored in this State, and belonging to the Federal Government, if there was any such ruling?

Mr. Green: I object to the question, subject to our reservations previously made, on the ground that the witness should be asked to state what the Department did or what

its ruling was with respect to any question put to it, and under which the witness is the responsible head of the Department should have ruled on. That is to say, that the question is with respect to what the attitude of the Department was rather than the action taken by the Department.

A. —The law, as I understood it to be, was that if such gasoline was stored in facilities under the control of the private companies such as Standard Oil Company, that the gasoline became subject to tax when it came to rest; [fol. 644] but that if the gasoline was stored in the storage facilities owned or leased by the United States, then the tax liability did not accrue, and the policy of the Department simply was to enforce the law, as we understood it.

By Mr. Dodson:

Q. And as Administrative Head of that Department, did you rule in accordance with your stated attitude as head?

A. Yes, and I am unable to give any example of any deviation from that policy; so far as I know, it was adhered to consistently.

Q. Do you recall any published rulings respecting that, in the Department?

A. Other than the published opinions of the Supreme Court and the regulations issued by the Department under the authority of the Act.

Q. Mr. McCanless, do you know Mr. Cicero Sessions presently of New Orleans, Louisiana, formerly Major Cicero Sessions of the United States Army?

A. Yes sir, I became acquainted with Major Sessions.

Q. When did you first know him, become acquainted with him?

A. I can't give you that date. It was during the war. He was an officer of the Army of the United States during all of the time I knew him.

Q. Where did you first meet Mr. Sessions?

A. I think it was here in Nashville, either in my office in the War Memorial Building, or in the Supreme Court Building.

Q. Was he here at that time in his official capacity or

[fol. 645] did he represent himself to be in an official capacity?

A. Yes sir. I don't remember when it was, but he was here in an official capacity. He was connected with the Tax Division of the Judge Advocate General's Department, of which Colonel Berryman Green was later head.

Q. Do you recall a conference that you had with Mr. Sessions and others at that time, do you recall having such a conference?

A. Yes, I think that was the purpose of his visit to Nashville, but I can't say now what was discussed at the conference.

Q. Do you recall anything that was discussed at that conference?

A. I remember very well some things which were discussed, but I can't say they were discussed in Mr. Sessions' presence. My memory is not that good.

Q. Were you asked by Mr. Sessions, if you recall, to give any ruling, as the Administrative Head, respecting the storage of gasoline by Esso Standard Oil Company at Memphis, Tennessee, or elsewhere, which gasoline belonged to the United States Government?

A. I don't remember that, no sir.

Q. Do you recall whether or not you gave such a ruling?

A. If I was asked to give such ruling, I don't remember it now.

Q. Mr. McCanless, do you recall any conferences that you had at any time with any of the other oil dealers in conjunction with the Federal Government, or the representatives of the United States Army, concerning the [fol. 646] storage of gasoline either at Nashville or at Memphis?

A. I remember one at Nashville.

Q. With whom was that conference, or concerning whose facilities was that conference held?

A. That conference was with respect to the storage of gasoline for the Air Force, and I remember that I approved the leasing of some storage tanks here in Nashville to the United States for the purpose of storage of aviation gasoline for the Air Force. These tanks were the property of a company whose name I remember to be Ingram Spinning

Company, but I know nothing about Ingram Spinning Company but that to the best of my recollection that was the name of the owner of the tanks. I know nothing about the corporate affairs or business of the company or its connection with any other company. I agreed that if these tanks were leased to the United States, then under the law gasoline, the property of the United States when stored in them, would not be subject to the State Gasoline Tax. I remember that. I don't know whether it has anything to do with the controversy in this case or not, because I am not familiar with that, but I cite the instance as an example of the agreement which I made and one of which I have some recollection, even at this date.

Q. Did you have conferences with anyone before approving that arrangement?

A. I remember Mr. Weakley having discussed it with me. That is Mr. R. L. Weakley, who now is Director of the Gasoline Tax Division of the Department. There may have [fol. 647] been somebody else present at the conference, I don't remember that.

Q. And the arrangement that you approved was a leasing of the storage facilities by the company that you recall to be the Ingram Spinning Company to the Federal Government, or the Army or whatever branch it was, for the storage of aviation gasoline, and under those circumstances that it would not be taxed by your Department?

A. Yes sir.

Q. Do you recall any other details respecting that, Mr. McCanless?

A. No sir. In fact, I don't know that I ever saw the lease itself, but I was consulted by Mr. Weakley and perhaps by someone in his company about such an arrangement, and I approved it.

Q. Do you know why it was worked out in that manner, was that ever discussed with you by any representative of the Government?

A. As we understood the law, the Government, in that manner, was to avoid, and properly avoid, tax liability.

Q. Was there any understanding reached between you and the representatives of the Federal Government concerning these tanks as to whether or not co-mingling of the

Federal Government's gasoline and any other gasoline would be permitted?

A. No, and as I thought I said a few minutes ago, I am not at all sure that any representatives of the Federal Government were present. I remember very well that Mr. Weakley conferred with me about it.

[fol. 648] Cross-examination.

By Mr. Green:

Q. Mr. McCanless, you testified that you met Major Sessions, do you know Major Sessions well?

A. No sir, not well. During the war I saw him on a number of occasions. We spent a good deal of time together at a meeting of the North American Gasoline Tax Conference at Milwaukee, and he was in Nashville on a number of occasions. I can't say that I know him well.

Q. Do you know that he is a member of the Montgomery Firm in New Orleans?

A. I understand he is practicing law in New Orleans.

Q. You know him as an honorable man?

A. Yes sir, I have a very high regard for him.

Q. You don't feel that after these many years of separation from the service that Mr. Sessions would have any interest in this case whatsoever?

A. I should think not; but if he had, I would think that that would not affect his testimony.

Q. Of course, as Administrator, you had many conferences on many tax questions, did you not?

A. Yes sir, a great many.

Q. I assume in those important conferences you kept minutes or memoranda of the conferences?

A. No sir, until today I have never felt any need for them, but I wish I had today.

Q. Contemporaneous memoranda of the conferences, signed by Major Sessions, would or would not be portayal of the conferences previously had by him and on which he [fol. 649] was submitting a memorandum, would that be true or not?

A. Yes sir, I should think they would be.

Q. Have you had offered to you a memorandum by Major Sessions with respect to gasoline Taxes?

A. I was in Nashville on December 2. Mr. Dodson and Mr. Cummings showed me a letter or a report which Major Sessions had written, I think about a page in length.

Q. A page and a quarter.

A. Maybe a little more than that. I saw that, yes sir.

Q. Do you remember a conference between General Barry, General Phillips, Mr. McCanless, yourself, and the others mentioned in that memorandum?

A. I should like to see the memorandum, if I may.

Q. I think Counsel can submit that to you.

Mr. Dodson: Here it is. It is Complainant's Exhibit No. 46. (Document handed to witness.)

The Witness: I remember some of the matters mentioned in the memorandum.

By Mr. Green:

Q. Have you any reason to believe that such a conference as mentioned in this Exhibit No. 46, was not held, or do you believe that such conference was had?

A. I would say from reading that letter, that such conference was had and I remember some of the things that happened there.

Q. It is a fact, is it not, as you stated in your direct examination, that the question of tax liability from the standpoint of gasoline taxes, was a subject discussed between your office and representatives of the War Depart-[fol. 650] ment, as well as the Oil Company?

A. Basing my answer on that memorandum, and not on my independent recollection, I would say yes.

Q. As a part of your responsibility in office, you were accountable for the collection of gasoline taxes and the records maintained with respect thereto, am I right about that?

A. Yes sir.

Q. As a part of your duty, and as a part of your supervisory functions, was a full and complete knowledge of the gasoline tax collections essential, is that true?

A. I received the reports each month of the collections, if that is what you mean. I didn't actually handle the ad-

ministration of the gasoline tax. That was done by Mr. Weakley, who was Director of the Division.

Q. Mr. Weakley, I take it, was responsible to you?

A. He was, and was under my control.

Q. Were you familiar with his records?

A. No sir.

Q. Did you examine his records?

A. No sir.

Q. Did you acquaint yourself with the frequency in which recorded Government aviation gasoline was coming into tanks and so forth at the Ingram Spinning Company or other places in Tennessee?

A. You mean did I know what they did or was I familiar with the records relating to those things?

Q. You mentioned the Ingram Spinning Company, the questions that arose on that, did you have a familiarity with [fol. 651] the method in which Mr. Weakley was treating those accounts?

A. No sir, but he conferred with me concerning the question and I gave him my ruling, I approved it, and he went ahead.

Q. Did he advise you of the method in which he was treating them?

A. What do you mean by the method in which he was treating them?

Q. From the standpoint of tax collections.

A. Yes sir.

Q. Did you advise Mr. Weakley whether such storages were taxable and that he was expressly to collect taxes on that account, or otherwise?

A. Not if the facilities were leased to the United States, or an agency of the United States, and the gasoline was the property of the United States.

Q. That was fully in accordance with the conferences had between you and representatives of the then War Department?

A. I am sure they were not inconsistent with any conversations that I had whatsoever.

Q. Did you discuss the question with General Barry?

A. I am sure I did, because I always discussed such matters with General Barry.

Q. During your many years as Commissioner, Mr. McCanless, for which I may say I think you have a nationwide approval and respect, was there united thought and united approval between your office, as Commissioner of Finance [fol. 652] and Taxation, and the office of the Attorney General, as exemplified by Attorney General Barry and Assistant Attorney General Phillips and yourself?

A. Yes sir, we worked harmoniously always. I relied on those gentlemen for legal guidance.

Mr. Waller: Cross examination is reserved for the Complainant, Esso Standard Oil Company.

Further Deponent saith not.

George F. McCanless, by T. Roy Hix, Reporter.

Sworn to before me when taken, the 31st day of January, 1951. T. Roy Hix, Notary Public, State at Large. (Seal.)

[fol. 653] DEPOSITION OF CLETIS GREENE—Filed July 25, 1951

CLETIS GREENE, being first duly sworn, deposed as follows:

Direct examination.

By Mr. Dodson:

Q. This is Mr. Cletis Greene?

A. Yes sir.

Q. Mr. Greene, what is your residence?

A. 901 Clearview Drive, Nashville, Tennessee.

Q. You have been a resident of Nashville for some time, have you not?

A. Since 1921.

Q. What is your present occupation?

A. Secretary of the Scottish Rite Masonic Lodge.

Q. How long have you been so engaged?

A. Since March 1, 1948.

Q. Prior to March 1, 1948, in what occupation were you engaged?

A. Supervising Examiner, Department of Finance and Taxation.

Q. Of the State of Tennessee?

A. Yes.

Q. How long had you been in that work?

A. Since October, 1935, I believe.

Q. You were continuously in that for the period from October, 1935 up until March 1, 1948?

[fol. 654] A. Yes.

Q. What was your particular work with the Department?

A. Well, I had charge of all of the records of the Gasoline Tax Division, which was, of course, varying from the carrier's report to the taxpayer's report, auditing all of them.

Q. Under whose immediate supervision and direction did you work?

A. Mr. R. L. Weakley was the Director.

Q. I believe Mr. George McCanless was the Commissioner of Finance and Taxation at that time?

A. Yes, and D. R. Henley was the Assistant.

Q. That was "Cy" Henley?

A. Yes sir.

Q. And he is now dead?

A. Yes sir.

Q. Mr. Greene, were you familiar with the fact that Esso Standard Oil Company, the Complainant in this case, was storing gasoline at Memphis, Tennessee, in 1944, which gasoline was the property of the United States Government, or some of its departments?

A. According to the records I received, yes.

Mr. Green: I want to object to that on various grounds, because it calls for a legal conclusion, and it assumes the Standard Oil Company was, as the question stated, "storing", which is a matter for the Court to determine.

The Witness: According to the records is all I know. I never did see them store any.

[fol. 655] By Mr. Dodson:

Q. Who furnished those records to you?

A. The inspector, I believe, was the first one that I found, or the bookkeeper found, and showed it to me and then

by the inspector, I mean the field man who inspected the gasoline.

Q. By inspector or field man, you mean an employee of the State of Tennessee operating out of the Department of Finance and Taxation, do you not?

A. Gasoline Tax Division, yes sir.

Q. Upon receiving information such as you have described, what did you do?

A. Well, the bookkeeper showed me the sheet, I don't remember the form number, F-4(b) or something, and asked me who was going to pay the tax on it. He was only concerned in putting on the book, and he didn't know how to put it on the book. As I recall it, I think maybe the records will show, it has been a long time ago, I wrote to the Standard Oil Company at Memphis.

Q. By Standard Oil Company, you mean Esso Standard Oil Company?

A. Yes sir.

Mr. Green: That is understood.

The Witness: I don't know whether they had changed their name or not. I think it was of Louisiana at that time. The reason I wrote to Standard Oil was because it was shown as being shipped from the Standard Oil and stored [fol. 656] in Standard Oil tanks. This report that the inspector furnished me showed that. I wrote them and asked them to advise who was to be charged with the tax. I don't think I received an answer.

Q. To whose attention was that letter directed, do you recall?

A. During that time I think Mr. Desaix. At that time I think Mr. Desaix was in charge of the office, but I don't know whether that one was directed to him or not.

Q. Was it your custom to direct your letters to Mr. Desaix?

A. Yes sir.

Mr. Waller: On behalf of the Complainant, we desire to object to any evidence concerning letters, unless the letters are put in the record, for the reason that the letters *chtm*selves would be the best evidence.

By Mr. Dodson:

Q. If you wrote any such letter, would it be over your signature or over the signature of Mr. Weakley?

A. My signature. All letters written by me were signed by me.

Q. Mr. Greene, did you receive any instructions, verbal or otherwise, while you were in the Department, respecting what action you were to take on gasoline owned by the Federal Government, but stored in this State?

A. I don't understand. I want to answer it as intelligently as I can. If the Government stored their gasoline in their own tanks, we had nothing to do with it, had no [fol. 657] right to enter into their reservation, but if it was stored with a company, my orders were to collect the tax.

Q. Did you receive any instructions from anyone in your department as to vary from that procedure?

A. No sir.

Q. Did you vary from that procedure?

A. No sir, not in any instance.

Q. Do you know of any instance where the Government was storing its own gasoline in its tanks?

A. Yes sir, plenty of it.

Q. Do you know of any particular one, do you recall any particular one?

A. They had a storage tank at Murfreesboro during the maneuver days. They had one here in Nashville at the old Ingram plant.

Q. Do you know what the correct name of that plant was, or who owned it, or anything about it other than the Ingram plant.

A. No sir.

Q. Mr. Greene, did you ever hear any conversation between Mr. Weakley, who I believe has been identified as the Director of your Department, and Mr. Desaix, who I believe you have previously identified as being with the Esso Standard Oil Company, or Standard Oil Company?

A. Well, I could say I do recall quite a number of conversations. Mr. Desaix, when he came to Nashville, I don't think many times that he didn't come to see us.

Q. To limit that, do you recall any conversations at any [fol. 658] time between the two of them, at which you were

present, respecting the Government gasoline at Memphis, Tennessee?

A. Indirectly, yes. I recall one visit that Mr. Desaix made, he was in my office. We had a separate office, the secretary's office in the middle, Mr. Weakley on one side and my office on the other. Mr. Desaix was in my office and I don't know whether he was in there on business or just stopped by to see me but Mr. Weakley came in, I don't know that he came in for any purpose except to speak to us or say something, and on this particular occasion there was something said with reference to this Government gasoline that was being stored in Standard Oil's tanks at Memphis, and in a department remark that Mr. Weakley made when he left the office, he said something about better keep a record of their stuff, that "Somebody may have to pay some tax sometime." Whether he was directing that remark to me or to Mr. Desaix, I personally—maybe it is not worth anything, what I think about it, I personally think he was directing it to Mr. Desaix.

Q. Did Mr. Desaix make any response to that, do you recall?

A. No, I think he smiled, as he always had a very nice smile, and didn't say anything.

Q. Mr. Greene, you are not at the present time, I believe, employed in any way by the State of Tennessee?

A. No sir.

Q. And have not been since March 1, 1948?

A. No sir.

[fol. 659] Cross-examination.

By Mr. Green:

Q. Mr. Greene, as I understood it, your name is Cletis Greene?

A. That is my middle name. I always sign my correspondence as J. C.

Q. You are J. C. Greene, formerly Supervisor Examiner for the Gasoline Oil Inspection Division of the Department of Finance and Taxation of the State of Tennessee, are you not?

A. Yes sir.

Q. Were you such during the month of December, 1943?
A. Yes sir.
Q. I believe, as I understood you when you stated that as a part of your responsibility in your office, that you understood that Government gasoline moving into Tennessee and stored only in Government facilities was tax exempt?
A. That is correct.
Q. Am I correct about that?
A. Yes sir.
Q. And the Court is to believe that only under those circumstances was the Department of Finance and Taxation to regard the gasoline as tax exempt?
A. Yes sir.
Q. Was that conclusion one arrived at independently, or one after consultation with your superiors?
A. I think that is in the law, sir.
Q. Was it your function to interpret the law?
A. Yes.
[fol. 660] Q. Then I hand you a letter dated December 29, 1943, which I will ask be introduced in evidence as Complainant's Exhibit No. 47, and ask you to examine that letter.

Mr. Waller: Can it be agreed that we can substitute a photostatic copy for the original?
Mr. Dodson: Yes.

(Document marked Complainant's Exhibit No. 47, witness Greene, and filed in evidence.)

(The witness examines the exhibit.)

By Mr. Green:

Q. Did you write that letter, Mr. Green?
A. Yes sir.
Q. I will hand you a carbon copy of a letter and ask you if you received that letter in the course of your business?
A. I am sure I did. I don't recall it.
Q. You did receive it. We can prove that you did. The answer, I suppose, is "yes"?
A. Yes.
Q. We ask leave to introduce that letter as Exhibit No. 48.

Mr. Waller: May we substitute a photostatic copy for the original?

Mr. Dodson: Yes.

(Document marked Complainant's Exhibit No. 48, witness Greene, and filed in evidence.)

[fol. 661] By Mr. Green:

Q. Mr. Greene, on your direct examination you testified as to the limited manner in which government-owned gasoline that was stored only in Government facilities was tax exempt. As a part of your duties, was it necessary for you to know and to be familiar with the gasoline storage facilities available and in use in the State of Tennessee?

A. Yes sir.

Q. I ask you this question, how many Government-owned facilities were available and used for storage of gasoline in Tennessee while you were in the Department of Finance and Taxation of the State of Tennessee?

A. I couldn't answer that exactly, from memory, sir, it has been so long.

Q. On your direct examination you testified to two.

A. I can still testify as to those two. You said all of them.

Q. How many gallons of gasoline space were available for storage in those two areas?

A. I couldn't answer that, sir, without seeing the records.

Q. Do you know of your own knowledge, having testified that they were Government facilities, that the second one which you mentioned was a Government-owned facility?

A. Of my own knowledge?

Q. Yes. You volunteered that on your direct examination.

A. All I could tell about it being a Government-owned, [fol. 662] I never seen a contract that was signed or anything like that, but——

Q. Upon your direct examination——

Mr. Dodson: Let him finish.

The Witness: The report I received, showed the gasoline was delivered to the United States Government, and it was my understanding that this storage plant was leased by the Government.

By Mr. Green:

Q. You gave two instances on direct examination; one was a plant at Murfreesboro, Tennessee, and the other was the River Terminal or Ingram Storage?

A. Yes.

Q. Do you know, or did you know then, or do you know now, that what you call the Ingram Storage facilities were owned by the Government?

A. No.

Q. Were they treated as tax exempt?

A. Yes.

Q. Why?

A. Because the inspector's report showed it to be United States Government gasoline. The inspectors went there and saw the place.

Q. Were you familiar with the Memphis Depot of Esso Standard Oil Company?

A. I have seen it.

Q. Did the inspector at that depot make the same report as was made by the inspector at the Ingram Plant?

[fol. 663] A. Yes sir.

Q. Why did you make any discrimination, if you made any between the two?

A. The gasoline which I wrote this letter about, nothing had been said about the Government.

Q. Forget the letter a minute.

A. That is the only way I know how to answer.

Q. I am asking a question. Answer the question. I will get to the letter after awhile.

Mr. Dodson: Let the record show an objection in the record to the form of the question, because from its very nature it is sought to be an intimidating question.

By Mr. Green:

Q. Did you make any difference in the keeping of the books, as Supervisor, between the tax accounts of the Government-owned gasoline moving into the Ingram Plant in Nashville, and the Government-owned gasoline moving into the Memphis plant of Esso Standard Oil Company, or Standard Oil Company of Louisiana?

A. Did I make any difference?

Q. Did you make any difference, did you treat them the same, or did you treat them differently?

A. Differently?

Q. Will you explain the difference with which you treated them?

A. Well, the report that I received in the beginning only showed that barge number so and so was received, from [fol. 664] Standard to Standard. The tax was not shown on the tax report when it came in, and of course I assumed that it was gasoline that maybe they overlooked. I wrote the letter and asked them to tell me who was to assume the tax. After I found out it was Government gasoline, according to Standard's information that they gave me, then it was treated as a separate item as U. S. Government gasoline stored in their tanks.

Q. And was reflected on the books of the Department of Finance and Taxation as "Tax exempt gasoline"?

A. We never did get the tax.

Q. I ask you this question, did you or not have anything to do with, or supervise the keeping of the gasoline tax accounts in the Department of Finance and Taxation?

A. Yes sir, I did.

Q. Were you familiar with those accounts?

A. Yes sir.

Q. I ask you this question, is it or is it not a fact that the gasoline owned by the Government, and moving into the Esso Standard plant at Memphis, was carried on the books of the Gasoline Tax Division of the ~~Tennessee~~ State Department of Finance and Taxation as "Tax exempt"?

A. It was carried on a separate sheet, as I understand, and as I remember, under, "U. S. Government stored in Standard Oil's Plant."

Q. I will ask you to look at the account and state whether or not the entire Government receipts of gasoline at Memphis were carried on the books of the State Department of [fol. 665] Finance and Taxation as "Tax exempt"?

Mr. Green: Show him the sheets.

Mr. Dodson: I don't know what you are talking about.

By Mr. Green:

Q. I will ask you to look at Complainant's Exhibit No. 42, which is a photostat of the records, and the attachments thereto making up a part of the exhibit, and explain?

A. This first sheet on Exhibit No. 42, evidently when it came into the office, this is an inspector's report showing, first, that all of this gasoline was consigned to Standard Oil Company. Later down on the fourth item, it looks like somebody has written, "exempt". All of those items were, under "Remarks," for the United States Army. I think you will find on the ledger sheet, if you have a photostatic copy of it, that under U. S. Army, every one of these items were charged to the Government as questionable items.

By Mr. Green:

Q. Did you make any demand, in your capacity, upon the Standard Oil Company for the payment of the tax at that time?

A. Not only when I wrote to them and found it was Government gasoline, I didn't say anything else.

Q. This is the basis upon which you wrote the letter of December 29th?

A. Yes sir, when I received a report like this, it showed this.

Q. The reply which was introduced in evidence was [fol. 666] received?

A. Yes sir.

Q. In short, when you found that it was Government-owned gasoline, there was no demand made for payment of the tax?

A. I didn't make any, sir.

Q. Of course you talked to Mr. Weakley about that?

A. Well, during that time, Colonel, of course we had a war and we were not questioning the Government about anything. In fact, we felt like if they wanted to take it, they would, and we didn't attempt to write to any Government officials about any tax.

Q. You knew that the largest amount of aviation gasoline in the State of Tennessee went to the Memphis Terminal, didn't you?

A. Aviation, yes sir. I think that is all they stored was aviation gasoline.

Q. Did you make a distinction between aviation gasoline and other gasoline?

A. No, but you said the largest amount. The largest amount went through Memphis. The same amount of tax is on one as the other.

Q. That was duly called to your attention by orderly reports of the inspectors?

A. Yes sir.

Q. Your office was fully advised of the gallonage moving into the Memphis Terminal?

[fol. 667] A. After this correspondence, yes sir. I think Mr. Weakley asked them to furnish that information on a supplemental sheet of their monthly report.

Q. Did you state the position and the policy of the Department of Finance and Taxation, the Gasoline Tax Division at the time of December 29, 1943?

A. Did I state it?

Q. Yes.

A. No sir.

Q. Will you explain your letter of December 29th, 1943, the purpose for which it was written and what you intended to elicit therefrom?

A. (Examines letter.) This letter, of course, was written in tracing the inspector's report by their report. I don't remember the report, if you don't have it, but it did not show that the gasoline was going to the United States Government, and it was an open item on the inspector's report, and of course it was not on the tax report of the taxpayer.

Q. I asked you if it is not a fact that when you got the reply to that letter, that it was Government-owned gasoline, you did or did not classify it as tax exempt?

A. I didn't classify it all, Colonel.

Q. You wrote the letter. Here is the reply to it. Will you tell us what action you took on the matter?

A. That is the same one you gave me awhile ago?

Q. Yes.

A. I don't recall having demanded the tax on it.

[fol. 668] Q. In other words, you accepted that as Government gasoline and thought that no tax was attributable on that shipment, is that correct?

A. In this particular instance, you see, I knew it was subject to tax, but I did nothing about it.

Q. Did you make any demand upon the Esso Standard Oil Company for payment of the tax?

A. No.

Q. Why not?

A. I was not authorized to.

Q. Who was authorized to make demand for the payment of the tax on that shipment which you thought was taxable?

A. Well, of course the Commissioner of Finance and Taxation was my boss, and then Mr. Weakley, and none of them told me to bill it. I don't recall billing it.

Q. Is it or not a fact that to your personal knowledge no demand, on account of that shipment or any other similar shipment, was made the subject of a tax demand on Esso Standard Oil Company?

A. According to my recollection, there was not.

Q. There was not?

A. No sir.

Q. Were you familiar with, or was it a part of your responsibility to have to do with the accounts of the office, the posting of the ledger sheets?

A. Well, we had a bookkeeper that kept the ledgers.

Q. Was it your responsibility?

A. I assisted him, yes sir.

[fol. 669] Q. Do you know whether or not shipments of this sort were classified by pencil or pen and ink, or any other indication on the ledger sheets, as exempt or as taxable shipments?

A. All Government gasoline that was stored by the Government, and that that was stored in somebody else's plant, if they had such a plant, was carried under the United States Government headed up as a taxpayer on the ledger sheet, "U. S. Government." All of that gas was treated by us as exempt gasoline.

Q. Mr. Greene, you are familiar with the gasoline storage facilities in Tennessee, are you not?

A. I am from the records, yes sir.

Q. And one of the largest storage facilities is located at Memphis?

A. It was at that time.

Q. And owned by the Esso Standard Oil Company?

A. I don't know who they are owned by.

Q. It is known as the Esso Standard Oil Company's plant there?

A. Yes sir.

Q. I will put this question to you, during the three or four years which are involved in this suit, did your department ever make demand upon the Esso Standard Oil Company for the payment of any tax whatever on account of Government gasoline going into those facilities and being stored and distributed therefrom by the Esso Standard Oil Company?

A. Not that I know of, sir.

[fol. 670] Q. I ask you whether that action was a considered action or a mere oversight on the part of your office?

A. Well, that I couldn't answer, sir. It was, of course, the practice of our office to check the tax on all gasoline stored in every taxpayer's facility, because the law specified that they could not store the gasoline in facilities owned and operated by and adjoining their property, and so forth, without being subject to tax.

Q. It is a fact that that is one of the largest gasoline receiving centers in the State of Tennessee?

A. It was then, yes sir.

Q. With full knowledge of the circumstances, as you have outlined them in your testimony, you tell the Court that no demand, so far as you know, was during that period made upon Esso Standard Oil Company by the State for the payment of gasoline tax on such gasoline?

A. None that I know of.

Q. In your capacity as supervisor and examiner for the Gasoline Tax and Oil Division of the Department of Finance and Taxation, did you instruct the gasoline tax inspectors throughout the State?

A. No sir.

Q. Who did that?

A. Mr. Weakley.

Q. Were you familiar with those instructions?

A. Well, I kept up usually with what he told them to do.

Q. Will you tell us what instructions the inspectors had [fol. 671] with respect to Government-owned gasoline going into the Memphis plant or to the Tennessee Oil Company at their plants?

A. No sir, I couldn't do that, because it didn't come through me. Mr. Weakley told them, and if I heard him or read some of the correspondence, I knew.

Q. Did you treat the Tennessee Oil Company gasoline receipts as you did these from the standpoint of bookkeeping?

A. Yes sir, I am sure they did. I wouldn't swear to that.

Q. In short, there was no exception made for Standard Oil Company, equal treatment of all oil companies receiving Government-owned gasoline in the State of Tennessee?

A. As I recall it, yes.

Q. And so far as you know, was there any demand made upon any of those companies for the payment of gasoline taxes on account of Government-owned gasoline received and stored by them or distributed by them in the State of Tennessee?

A. I think the records would show that. I would rather not testify to something that I can't remember. I might not remember whether they were billed or not, some oil companies.

Q. You have mentioned the Ingram facilities here?

A. Yes sir.

Q. Will you tell the Court the treatment, taxwise, which was accorded to the receipts of that company on account of Government-owned gasoline?

[fol. 672] A. We made no record of what they received. We didn't know what they received.

Q. Did you make the same record on them that you did on the Standard Oil Company in other shipments?

A. No.

Q. Why did you make that distinction?

A. Because I knew the gasoline was going into Standard Oil Company facilities. This other place, it was supposed to be leased by the Government and we had no right to go into it.

Q. Did you investigate that?

A. I am sure the Department did. I didn't personally.

Q. Did they investigate whether or not the Memphis facilities were leased?

A. I think they did, through the inspectors.

Q. Did you see the contract?

A. No sir.

Q. Did you discuss that with Mr. Weakley?

A. I don't recall having discussed it, no sir.

Q. Do you know of any factual difference between the situation at the Ingram plant and the situation at the Memphis plant?

A. You mean by that, sir——

Q. I mean to say any difference in lease or anything, say difference?

A. Only through my understanding that the Government had this place leased and they did not have Standard Oil Company's plant leased.

[fol. 673] Q. The Department made an investigation of that, didn't they?

A. Yes sir, I am sure they did.

Q. I hand you Complainant's Exhibit No. 44, which is a photostat record from the Office of the Commissioner of Finance and Taxation, Gasoline Tax Division, and I will ask you if I am correct in saying or believing that that is for the month of January, 1944?

A. That is right, sir.

Q. Am I correct that that reflects the shipments by the Standard Oil Company of Louisiana, or Esso Standard Oil Company now, the Complainant in this suit, of gasoline at the Memphis plant?

A. Some of it is Memphis, yes sir.

Q. Confine yourself to the Memphis shipments, and I will ask you whether on the records of that office such shipments were carried as exempt or government-owned gasoline?

A. Yes sir, they were carried on the ledger separate from all others from the Shell and Gulf.

Q. I will ask you if these records are made from the inspectors' reports, which you received from your subordinates in the field, of the Esso Standard Oil Company?

A. Made from the inspectors' reports.

Q. State whether or not those sheets show that any tax was attributable to or owing to or because of such shipments of gasoline?

A. I don't believe I understand you.

Mr. Green: Read the question.

[fol. 674] (The last question was read.)

The Witness: Under the column, "Gallons Taxable," they have the gasoline gallonage listed. There is nothing on this sheet that shows that it is taxable to anybody, but the sheet itself is listed as "U. S. Gas," at the top.

Q. Has the Department considered that or treated that as taxable? Had there been due any tax on account of such shipment, would this sheet have shown such tax?

A. No sir.

Q. Where would it have appeared?

A. It would have shown on the tax report, the gallonage.

Q. Will you get the tax report for January, 1944, or will you have Mr. Weakley get that and let us know how much tax the Department considered is due during the month of January, 1944?

A. I don't have access to those records any more.

Q. Was any demand made?

A. I am sure it was not. It wouldn't have been on that sheet if it had been.

Q. Mr. Greene, is it or not a fact that in your administrative capacity you knew that millions and millions of gallons of gasoline were going into the Memphis plant that was Government-owned gasoline, and that that went on for years, and that you knew that the Department in which you were a Supervisor and Director not only was not making any demand for the payment of any tax, by Esso Standard Oil Company or anyone else, and that you not only knew that, but that you did not collect the tax?

A. Yes sir.

[fol. 675] Q. Did you consider that special treatment of the Standard Oil Company of Louisiana or Esso Standard Oil Company, or was that the general treatment given to all oil companies?

A. During that particular time, as far as I know, we collected tax on everybody else that stored it in their plant.

Q. We are speaking now of Government-owned gasoline going into plants?

A. Yes sir.

Q. Could you give me one instance in which the State of

Tennessee collected gasoline tax on account of Government-owned gasoline going into any facilities and being stored?

A. Well, I wouldn't know, not unless I saw the records.

Q. It would be most unusual for such a thing to have happened, wouldn't it?

A. I don't believe—will you not put this on the record? As far as I know, there was not any other gasoline stored. I am not going to *to* testify about something I don't know. The records would show that.

Q. I am not trying to pin you down.

A. Pin me down when you get ready. I will get out.

Q. Why was Government-owned gasoline stored, either by Esso Standard Oil Company at Memphis, or by any other oil company in the State of Tennessee in their facilities, or other facilities, earmarked as "Government gaso-[fol. 676] line" on the books of the State of Tennessee, Department of Finance and Taxation?

A. Because the fact that it was Government gasoline and it was questionable.

Q. If it was Government gasoline, what result flowed from that?

A. I didn't understand your question.

Q. If it was Government gasoline, what result flowed from that ownership?

A. If it was stored in a facility owned by an oil company, it was subject to tax.

Q. Can you give me one single instance during the three or four years involved in this suit, in which the State of Tennessee, through its Department of Finance and Taxation, made any demand or claim upon an oil company for the payment of tax on account of such gasoline?

A. None that I know of.

Q. Do you know of any instance in which they received payment of tax in such instance?

A. I don't recall, sir.

Q. You wouldn't have the Court believe that the Department of Finance and Taxation was giving the oil companies of the United States the benefit of an administrative error, would you?

A. No.

Q. In other words, the action of the Department was a deliberate action rather than an action of inadvertence?
A. I am sure that it was.

[fol. 677] Further cross-examination.

By Mr. Waller:

Q. Mr. Greene, you have identified two letters which have been filed, or photostats of which have been filed as Exhibits 47 and 48. I would like to ask that you read these two letters into the record.
A. I will.

(The Exhibits referred to above, being Complainant's Exhibit Nos. 47 and 48 were read into the record by the witness as follows:)

EXHIBIT No. 47

"December 29, 1943.

"Standard Oil Company,
"1211 Union Avenue,
"Memphis, Tennessee.

"Attention: Mr. H. E. Desaix

"Subject—Barge C., November 15th & Barge RTC-52, November 11th

"GENTLEMEN:

"Each month our Inspectors at Memphis are reporting quite a few bar receipts for you and do not indicate whether or not the gasoline was delivered to you or the U. S. Government. The two barges mentioned above he shows as the Standard Oil Company being liable for the tax and does not know the gasoline was delivered to the U. S. Government. Of course, when we post these items to our ledger it is necessary that [fol. 678] we accept the information given by the Inspector, and when your report does not include the shipments it is necessary that we trace.

"We are wondering whether or not you people are giving our Inspectors the information on these receipts and if it is not possible for your men to advise our Inspectors just where the gasoline is going.

"We will appreciate it very much if you will advise whether or not this gasoline was government gasoline so that we might clear our records.

"Yours very truly, Gasoline Tax & Oil Inspection Division, (Signed) J. C. Greene, Supervisor, Examiner.

"JCG:vs."

EXHIBIT No. 48

"December 30, 1943.

"State of Tennessee,
"Department of Finance & Tax.,
"Nashville 3, Tennessee.

2219

"Barge 'C'—November 15

"Barge 'RTC-52'—November 11

"Attention: Mr. J. C. Greene

"GENTLEMEN:

"The subject barges, mentioned in your December 29 letter, contained U. S. Government-owned Aviation Gasoline. We are instructing our Terminal Superintendent to always inform your Inspector when the gasoline being unloaded is government-owned so that [fol. 679] your man can indicate this fact on his report.

"To comply with the request contained in Mr. Weakley's December 16 letter we will, beginning with our December report, list the receipts of government-owned Gasoline on a separate schedule. This should further assist you in checking these movements.

"Yours for Victory, Office Manager."

"HED:RD."

By Mr. Waller (Continuing):

Q. You mentioned an occasion when Mr. Desaix was present in your office, or that of Mr. Weakley, and some remark was made. When was that, was that before those letters were written?

A. No.

Q. That was after the Standard Oil Company had begun making the separate records of Government-owned gasoline?

A. I am sure it was, yes sir.

Q. And what was the occasion of the remark?

A. As I stated, in the record, Mr. Desaix was in my office, as he frequently came, and Mr. Weakley came in during the time that Mr. Desaix was in the office. There was some mention made of this particular gasoline that was being stored by the Standard Oil Company, according to the reports that I had received, and earmarked, "Government gasoline." In Mr. Weakley's parting remark as he went out the door, he said, "We had better keep a good record of [fol. 680] this gasoline, somebody might have to pay the tax on it some of these days."

Q. You don't know when that was?

A. It was after this time, during the period when they—after Mr. Desaix had complied with the request of the Office to give a *spearate* report of that gasoline that was stored in these tanks.

Q. You say no request was ever made of anybody to make such a report with reference to the gasoline stored in these tanks.

Q. You say no quest was ever made of anybody to make such a report with reference to the gasoline stored in the Ingram tanks?

A. No sir, not as I know of.

Q. You received no reports from a concern known as the River Petroleum Company, which had leased the Ingram tanks?

A. No sir, not that I recall.

Q. I show you Complainant's Exhibit No. 44, and ask you to see if you notice anything about the River Petroleum Company, next to the bottom line?

A. Yes. Was that the Ingram plant? I never knew the name of it.

Q. Yes.

A. It is on here, a shipment from St. Rose, Louisiana, it looks like, to the River Petroleum Company at Nashville.

[fol. 681] Redirect examination.

By Mr. Dodson:

Q. Mr. Greene, just one or two clarifying questions here. First with respect to Exhibit No. 44, you were asked about that, and it was referred to inadvertently I am sure, as "U. S. Gas." Actually doesn't it bear the heading, "U. S. Gov.?"

A. Yes sir.

Q. I believe that is your writing?

A. No sir, I could read it if it was.

Q. What does it appear to you to be?

A. "Gov." I thought that was "Gas." That is Mr. Aiken's writing.

Q. He was a bookkeeper there in the Department?

A. Yes sir.

Q. Complainant's Exhibit No. 42 has been shown to you that has written on it, following several items, "Exempe." I want to ask you if that is your writing?

A. No sir.

Q. Do you know whose that *it*?

A. I am not a handwriting expert, but I would say that was Mr. Aiken's.

Q. The bookkeeper's?

A. Yes sir.

Q. Mr. Greene, did you ever discuss with Mr. Weakley the question of whether or not this gasoline was subject to tax, the gasoline we are talking about here?

[fol. 682] A. Yes sir, we fussed about it a lot.

Q. Why did you fuss about it?

A. Because I felt that it was subject to tax.

Q. Did he disagree with you?

A. No sir.

Q. Did the Commissioner disagree with you?

A. I don't recall ever having talked to the Commissioner about it. He didn't disagree, though, as far as I know.

Q. You received no instructions not to collect it?
A. No sir.
Q. You did not bill it at that time, though?
A. No sir, not as I recall.
Q. As a matter of fact, when it was billed, this lawsuit arose, didn't it?
A. From the papers I read, yes.
Q. Let me ask you this, Mr. Greene, you were asked several questions about it, do you know of anyone, other than Standard Oil Company or Esso Standard Oil Company, who was storing Government gasoline in facilities which they owned and controlled, if that be a fact with respect to Esso Standard Oil Company, that the company owned?
A. I never knew of it, if it was.
Q. And whether it be true or not, your understanding with respect to the Ingram deal is that is was different?
A. Yes.
Q. That was the information which you had in your Department?
A. That is right.

[fol. 688] Recross examination.

By Mr. Greene:

Q. Do you know the Tennessee Oil Company, or did you know them during the days you were connected with the Department of Finance and Taxation?
A. Yes sir.
Q. You have just said, in reply to one of Mr. Dodson's questions that you didn't know of any oil company handling gasoline as the Standard Oil Company of Louisiana did at the Memphis Terminal, is that right?
A. If they were handling it, I don't recall it.
Q. Don't you know the Tennessee Oil Company at two terminals were handling gasoline in almost the same quantity and that was treated upon the books of your Department exactly the same as that of Esso Standard Oil Company?
A. I don't recall, sir.
Q. Do you know that the Department of Finance and Taxation of Tennessee, having let the Statute of Limita-

tions run for three years, is now suing the Tennessee Oil Company for the recovery of taxes, exactly as they have in this case?

A. No sir, I didn't know that.

Q. Do you mean to tell me that the second largest taxpayer in the State of Tennessee on Government-owned gasoline, if they were taxpayers, escaped your notice?

A. I don't recall, sir.

Q. You do know of Tennessee Oil Company, though?

A. Oh, yes.

Q. Do you know what gasoline was being received at their two terminals during the period involved in this suit?

[fol. 684] A. The records would show.

Q. Whose gasoline was it?

A. I couldn't tell without looking at the records.

Q. It was Government gasoline, I will reply for you, for your information.

A. I don't know about that, sir.

Q. You have said that you have discussed this with Mr. Weakley?

A. Yes sir.

Q. You have said on your direct examination that you felt very strongly that this was taxable gasoline?

A. Yes sir.

Q. You have said that Mr. Weakley agreed with you in that conclusion?

A. Yes sir.

Q. Is it or is it not a fact that General Barry and Assistant General Phillips disagreed with you and Mr. Weakley?

A. Not with me, they didn't, because I didn't talk to them.

Q. Do you know that such conversations were had between Mr. Weakley, General Barry and General Phillips?

A. Not of my own knowledge.

Q. Are you prepared to say or agree, or deny, that your office practices with respect to the gasoline shipments in this case were in accordance with the views of the Attorney General's Office?

A. The entire office was run under that.

[fol. 685] Q. In short, you didn't collect the tax because the Attorney General of Tennessee didn't think it applied?

A. I couldn't say that, sir.

Q. Why did you not collect the tax if you believed and Mr. Weakley believed that it was due and payable?

A. I was only the Supervisor, sir, I had to be authorized to bill anything.

Q. Do you mean to imply that Mr. Weakley was negligent in the performance of his duties and obligations?

A. No sir, he was not.

Q. Do you mean to have the Court understand, Mr. Greene, that Mr. Weakley was simply giving the Esso Standard Oil Company a latitude that others didn't enjoy?

A. No sir, I am sure he would not.

Q. Do you mean to have the Court believe that Mr. Weakley did not consult with his superiors?

A. He always consulted with his superiors.

Q. Do you believe Mr. Weakley acted in accordance with their views?

A. I am sure he did, or he wouldn't still be there.

Q. That is right, and you do know as a fact that so far as you know, during your employment, during all of this period, no demand was made upon any oil company or upon the Esso Standard Oil Company, or Standard Oil Company of Louisiana, for the payment of any tax?

A. As far as I know, no sir.

Q. And you do consider that Mr. Weakley, as I consider, was performing his duty conscientiously and as legal advice was given to him?

[fol. 686] A. I was with him twelve years, and I didn't find him any other way.

Further recross examination.

By Mr. Waller:

Q. Mr. Greene, you told Mr. Dodson that the information that you had was that the Ingram tanks were leased to the United States Government, did you not?

A. Yes sir.

Q. Where did you get that information?

A. I don't know whether I had it in writing or not, but Mr. Weakley had charge of the inspectors and they were the ones that went to these places and made these inspections, and I wouldn't say that Mr. Weakley directly told

me that, but I don't know how else I could have found it out.

Q. You didn't get it from Mr. Ingram or from the United States Government, did you?

A. No sir.

Q. And you don't know of anybody in your department that did, do you?

A. No sir. The inspectors furnished us with a report on this, you have a copy of one of them there, with the barges on it, showing that it came from—in a lot of cases—the United States Government to the United States Government. There was no other plant operating out there. I knew Ingram was out of business, and when Government gasoline began flowing in there to this plant, of course from the records, it was U. S. Government. Nobody else got any gasoline.

[fol. 687] Q. And you didn't even know the Ingram tanks had been leased to the River Petroleum Company?

A. I didn't know about the River Petroleum Company.

Q. You saw on that exhibit the River Petroleum Company?

A. Yes sir.

Q. You say that was Nashville?

A. Mr. Waller, I didn't have any records to show who had the plants or who was getting the gasoline, because I understood personally that it was Government property, the Government was receiving it, and I didn't even go to the trouble to look at it.

Further recross examination.

By Mr. Green:

Q. Mr. Greene, is it or not a fact, irrespective of leasing ownership of other considerations, that the Tennessee Oil Company, the Esso Standard Oil Company, or the Standard of Louisiana, and the River Petroleum Company on this terminal here, all were treated the same?

A. No sir.

Q. They were all carried on your books as the same, as Government-owned gasoline and exempt?

A. If it was billed to the Government, yes.

Q. So all of them were treated the same way, irrespective of ownership?

A. On the ledger, yes.

[fol. 688] Q. And in other words, River Petroleum Company didn't pay taxes, and Esso Standard Oil Company didn't pay taxes?

A. Not on Government gasoline.

Q. And so as a matter of absolute accuracy, so far as the Department was concerned, it didn't make a great deal of difference whether the tanks were owned or leased or what not, is that true?

A. I think it made a difference, yes sir.

Q. What difference was it?

A. Well, the gasoline that was stored by these companies was taxable, under the law.

Q. That is a conclusion.

A. And we had no right to exempt them.

Q. I mean to say that the State of Tennessee didn't collect any money from any of them?

A. That is right.

Q. Whether they owned or leased or anything else about the tanks, they all received the same treatment?

A. As far as I know there never was any tax collected on any of that gasoline.

Q. I will ask you this question. You discussed this with Mr. Weakley?

A. Yes sir.

Q. And you and Mr. Weakley came to a conclusion with which your superiors did not concur?

A. About that I don't know.

Q. And the result of which you have made no demand, Mr. Weakley made no demand for the payment of taxes, am I correct about that?

[fol. 689] A. So far as I know, he did not.

Q. Now, you would have the Court believe that there is a distinction made between leased or other owned tanks in which this gasoline was stored, is that correct?

A. So far as the law is concerned——

Q. I am not talking about the law. I don't know much law, but let that rest with me for a few minutes. There was not any difference, was there?

A. Under the way we handled it, no.

Q. You are familiar with that law you speak of, aren't you?

A. Not too much.

Q. You were administering it?

A. The gasoline Tax Law.

Q. Do you recall an instance of the Tennessee Oil Company putting gasoline into a tank leased by a county?

A. That was a long time ago. It seems that I do.

Q. That is the point I am making.

A. Way back yonder when they had some trouble with Arkansas.

Q. The Court didn't think much of the point that you and Mr. Weakley, your superior, made, did they?

A. At that time?

Q. Yes.

A. With the Tennessee Oil?

Q. Yes.

A. I don't recall that case, sir. It was a long time ago.

[fol. 690] Q. But you and Mr. Weakley came to that point, after consideration?

A. With reference to the liability?

Q. The leasing and non-leasing?

A. Yes.

Q. I will ask you the question, why was it necessary to do that, and after having considered and made that distinction, where did you apply it in one instance and not apply it in the other? Why did you exempt the tax because of non-leasing and why did you collect the tax because of leasing in any one instance?

A. Where or why?

Q. Where or when or how. You made the distinction, you and Mr. Weakley. Give me one instance where you collected the tax because of that distinction?

A. I don't think I could give you that, sir. Up until the time that the war was declared and the Government was receiving gasoline and they were having a hard time getting it distributed to these various air bases, when this gasoline came into Memphis, personally——

Q. We are not speaking about this gasoline. We are speaking about any gasoline.

A. Any of it I am talking about too.

Q. That comes into the State of Tennessee owned by the

Government, part of which goes into Government-owned tanks and part of which goes into leased tanks, and part of which goes into company-owned tanks, three situations, I am asking you to tell me a single instance in which the [fol. 691] State of Tennessee attempted to, or did collect a tax?

A. None that I know of.

Q. So the distinction which you make is a distinction without a difference, is it not?

A. Without a difference?

Q. Yes.

A. I guess you could call it that, yes sir.

Q. In other words, it is a theorefical distinction, because you didn't collect taxes in either one of the three situations?

A. No sir.

Q. So your discussions with Mr. Weakley and Mr. Weakley's discussions with you were more or less miasmic, weren't they? They were intangible, you didn't get into dollars, did you?

A. We didn't get anywhere in our arguments.

Further Redirect Examination.

By Mr. Dodson:

Q. Of course as to what taxes had been collected or not collected since 1948, March 1, you don't know officially?

A. No sir.

Mr. Green: All of my examination related to the period involved in this suit and up to the time he left the Department.

Further Deponent saith not.

Cletis Greene, By T. Roy Hix, Reporter. (Seal.)

Sworn to before me when taken the 31st day of January, 1951. T. Roy Hix, Notary Public. My Commission Expires April 6, 1954.

[fol. 692] DEPOSITION OF GEORGE F. McCANLESS (recalled)—
Filed July 25, 1951

Pursuant to the foregoing caption, and pursuant to adjournment on January 31, 1951, the deposition of George F. McCanless was resumed, in accordance with reservation by Esso Standard Oil Company, for the purpose of cross-examination, in the offices of Waller, Davis & Lansden, American Trust Building, Nashville, Tennessee, on April 11, 1951, at 2:00 o'clock P.M.

APPEARANCES:

For the Complainant: William Waller.

For the Defendant: K. Harlan Dodson, Jr., Joe Brown Cummings.

GEORGE F. McCANLESS, having previously been sworn, further testified as follows:

Further Cross-examination.

By Mr. Waller:

Q. Mr. McCanless, since you gave your direct testimony in this case, I believe you have read the testimony of Mr. R. L. Weakley and the testimony of Mr. Cletis Green?

A. Yes sir.

Q. And you came by my office this morning and looked at certain correspondence that I showed you, did you not?

[fol. 693] A. Yes.

Q. I will show you what purports to be a letter signed by you dated August 11, 1943, addressed to me, and I will ask if you can identify that as a letter you did write to me on that date?

A. Yes sir, that is my letter and my signature.

Mr. Waller: I will offer a photostat of that letter as Complainant's Exhibit No. 50, and as I understand, there are no objections to the photostats?

Mr. Dodson: No objection to the photostats. We of

course would not waive any objections as to the materiality of the letter, or anything of that nature.

(Document marked Complainant's Exhibit No. 50, witness McCanless, and filed in evidence.)

By Mr. Waller:

Q. I also show you two letters, each of which purports to be in reply to your letter, being my file copies, and therefore not showing my signature except the fact that there are my initials on the lower lefthand corners. I will pass those to you and ask you in the same way, if you can identify those as being replies to your letter, or do they seem to be such replies?

A. These two letters seem to be appropriate replies to my letter, but I have no independent recollection of them.

Mr. Waller: I would like to have those marked filed as Complainant's Exhibits 51 and 52, respectively, the letter of September 16, being Exhibit No. 51, and the letter of October 15, being Exhibit No. 52.

[fol. 694] (Documents marked Complainant's Exhibit Nos. 51 and 52, respectively, witness, McCanless, and filed in evidence.)

Q. Now, for ready reference, will you read into the record your letter and the two letters in reply?

A. I will so read.

(Complainant's Exhibit No. 50, was read by the witness as follows:)

"August 11, 1943
"Mr. William Waller
"Armistead, Waller, Davis & Lansden
"American Trust Building
"Nashville, Tennessee.

"Dear Mr. Waller:

"Mr. Weakley has informed me that the Standard Oil Company of Louisiana is storing gasoline owned by the United States Government at various points in Tennessee.

"It is necessary that the department of Finance & Taxation be furnished copies of all the contracts between the Company and the Government relating to this storage and I will appreciate your seeing to it that they are prepared and delivered to the Department at an early date.

"Yours very truly, George F. McCanless, Commissioner."

"GFM:mws"

[fol. 695] (Complainant's Exhibit No. 51 was read into the record by the witness as follows:)

"September 16, 1943
"Hon. George F. McCanless
"Commissioner of Finance and Taxation
"War Memorial Building
"Nashville, Tennessee.

"Dear Sir:

"Pursuant to your request I hand you herewith photostat of U. S. Army Service Contract with Standard Oil Company of Louisiana, W535ac34657, which expires June 30, 1943, but has been extended to September 30, 1943; also photostat of U. S. Navy Service Contract with Standard Oil Company of Louisiana, NXsx-20795, which terminated on June 30, 1943.

"Please return these documents after they have served your purpose.

"Yours very truly,——.

"WW:mr."

(Complainant's Exhibit No. 52 was read into the record by the witness as follows:

"October 15, 1943
"Honorable George F. McCanless
"Commissioner of Finance & Taxation
"Memorial Building
"Nashville, Tennessee

"Dear Sir:

"On September 16, I sent you two Standard Oil Com-
[fol. 696] pany of Louisiana contracts and am now

handing you photostat of Navy Contract NXsx 32078, and photostat of extension on Army contract W535ac-36457. You now have copies of all the contracts you requested.

"After these documents have served your purpose, please return them to me.

"With best regards, I am

"Yours very truly."

"WW:EAR

"Encl."

Q. You have not actually examined your correspondence file that you had while you were Commissioner of Finance and Taxation?

A. No sir.

Q. You left that file in the Department when you left, did you not?

A. I am sure I did. I didn't keep the files myself, but I am sure I didn't take any of the correspondence away with me when I retired from office.

Q. Did I also show you this morning photostat of a contract bearing the same designation, that is, No. ac36457, which is referred to in the letters of September 16 and October 15?

A. Yes sir.

Q. And being Complainant's Exhibit No. 35?

A. Yes sir, you showed me that photostat.

[fol. 697] Q. I believe I also showed you Defendant's Exhibit No. 1, which is a contract between the Army Air Forces and the River Petroleum Corporation, did I not?

A. Yes sir, you did.

Q. Mr. McCanless, having refreshed your recollection from this correspondence and these documents, would you say that the Department of Finance and Taxation in 1943 was informed as to the method and the manner of storing of Government-owned gasoline by the Standard Oil Company of Louisiana?

A. Yes sir, I should say so, but I have very little independent recollection about the matter.

Q. Have you heard or seen anything since the period in-

volved that would lead you to believe that any pertinent fact was concealed or withheld from your Department?

A. No sir. I might add this, that I do not suspect, and never have suspected, that such information was withheld.

Q. Would you say that the Attorney General's Department was also informed as to the facts concerning this handling of Government-owned gasoline?

A. I have no direct information in regard to the conferences which may have been had with General Barry of the Attorney General's Office, and which were had in my absence, but from the information that I have received, which I admit is largely hearsay, I am of the opinion that the Attorney General's Office was informed about the situation.

Q. Would there or not have been in the regular course of the dealings between your Department and the Attorney General's Department, times when they would be informed?

[fol. 698] A. Yes, it was my custom to discuss matters of consequence, particularly those presenting novel questions, with General Barry, and I was guided by his advice; and I think that on at least one occasion I discussed this subject with General Barry, though my recollection of it now is very dim. As you suggested in your first question, I read Mr. Weakley's testimony after it was transcribed, of course, and in fact I had heard a part of it when he gave it, and that refreshed my recollection to some extent, and my best recollection is now that I did on at least one occasion have some conversation with General Barry about these matters, though I can't begin to release the substance of it.

Q. From the fact that you did have this information and the applicable contract, at least the one that was in force during 1943, and that no claim was made for the gasoline taxes on any of this gasoline, would you say that your Department and the Attorney General's Department concluded that there was no tax liability on the part of Standard Oil Company of Louisiana, by reason of the storing of this Government-owned gasoline?

A. I will have to answer that question in some detail. I cannot say that I actually read the contract between the Army Air Forces and River Petroleum Corporation, but I do remember that Mr. Weakley discussed the contract

with me. Mr. Arthur Anderson, who has been with the Gasoline Tax Division of the State of Minnesota, and who I knew and had known for the past two years in 1943, came [fol. 699] to Nashville and discussed the contract with Mr. Weakley. Mr. Anderson then was an officer, a lieutenant, I think, in the Air Force. After this conversation, Mr. Weakley discussed the arrangements that had been made and the contract. The name of River Petroleum Corporation is not familiar to me. I remember hearing the name, Ingram's Spinning Company, discussed. I have been told that the storage facilities embodied in this contract were on the Ingram property. I think the reason I remember the name, Ingram Spinning Company, is that that probably was the name which Mr. Weakley used, because he had dealt with that company in the matter, and it remains in my recollection for the reason that it seemed unusual to me that a spinning company should have gasoline storage facilities, but Mr. Weakley and I were both satisfied with the contract under which the Air Forces had arranged for the use of the storage facilities on this property. I have no recollection of the contract with Standard Oil Company at this time. I have no recollection at this time of the contract with Standard Oil Company.

Q. Mr. McCanless, you referred to the River Petroleum contract, Defendant's Exhibit No. 1, covering the period from November 1, 1943 to June 30, 1944, whereas, the Standard Oil Company contract that I sent you in September, 1943, Complainant's Exhibit No. 35, originally covered a period ending June 30, 1943, and was then extended to cover subsequent periods. In other words, the original Standard Oil Company of Louisiana contract covered a period much earlier than the River Petroleum contract? [fol. 700] A. I realize it does, but my recollection of the River Petroleum Contract is because of the presence of Arthur Anderson and the conversations that I had with Mr. Weakley. I happen to remember that.

Q. What I am trying to get you to tell me is whether or not, having received the Standard Oil Company contract in September, 1943, and being advised by Mr. Weakley of the fact of the storage of this gasoline, and having in all probability discussed the matter with Attorney General Barry,

did you and your Department come to the conclusions that the gasoline handled this way was taxable or not taxable?

A. We took no steps to collect the tax, and I am sure that if we had decided that there was liability, that we would have taken such steps. I could remember that Mr. Weakley on more than one occasion, and I can't say whether it was on more than two or not, did mention a liability or a possible liability which he thought might have accrued as the result of the storage of aviation gasoline by Standard Oil Company; but if General Barry and I had been of the opinion that the liability existed, we would not have hesitated to have taken the appropriate steps to enforce the liability. We always did that when we felt that there was a liability.

Q. Then, Mr. McCanless, your answer is that you and General Barry felt that there was no liability on the part of the Standard Oil Company of Louisiana?

A. I think that probably may be inferred—though I [fol. 701] can't say from my memory that we ever went into a conference and came out of it in final agreement that there was no liability; but, as I say, if we had felt that there was a liability, we would have proceeded to collect the amount we thought was due.

Q. In your direct testimony, you said something to the effect that in your opinion of the law, there was no tax liability for the storage of gasoline owned by the United States Government in storage facilities owned or leased by the United States. I want to ask you whether, in the light of this correspondence that we have referred to, and these contracts, you would say that it was also your view that Government-owned gasoline was not taxable where it was stored pursuant to this type of contract, namely the type of contract embodied in the Defendant's Exhibit 1 and Complainant's Exhibit 35?

A. I was of the opinion, and I am sure Mr. Weakley was, when we talked it over together that there was no liability under the River Petroleum contract. That is my recollection now, and that recollection is pretty clear, considering the fact that the matters happened about eight years ago.

Q. When you said that your view was that gasoline owned by the Government was not taxable when stored in the storage facilities owned or leased by the United States,

you didn't mean, or you don't mean that those would be the only circumstances in which Government-owned gasoline would not be taxed?

A. I shouldn't say that. That would probably be a matter for the courts to decide.

[fol. 702]

Q. I am not asking you about your view of the law for the purpose of suggesting that that would be controlling, but rather what you understood the law to be back in 1943 and 1944, and in those years when, as you say, the Department did not undertake to make any claim for this particular gasoline tax.

A. I should say that I never was of the opinion that there had to be an actual ownership of the facilities or a technical lease, in order for the liability to be avoided. To that extent, I would like to amend my direct testimony.

Redirect examination.

By Mr. Dodson:

Q. Mr. McCanless, the only contact, as I understand your testimony, that you had with the River Petroleum Company contract was what Mr. Weakley told you about it?

A. I am not sure that is true. I know that Mr. Weakley and I discussed it. Whether I read it through or not, I can't say, but that contract was discussed and I understood that Mr. Weakley was familiar with it and I may have read it myself.

Q. That was the River Petroleum Company operating here in Tennessee in connection with the Ingram Spinning Company?

A. That is the way I understand it. Until I was here and testified and heard some of Mr. Weakley's testimony

[fol. 703]

on January 31, I was not familiar with the name "River Petroleum Company." If I had been, I had forgotten it; but the name, "Ingram Spinning Company" had stayed in my mind somehow.

Q. So far as you know definitely, any River Petroleum Contract that you talked about was the contract that Mr. Weakley was referring to, is that correct?

A. That is right.

Q. And whether or not it was the River Petroleum Corporation of New Orleans, do you know?

A. I don't know a thing about that, no. I don't remember that. I had inferred from questions which had been asked me, and from listening to and reading the testimony of Mr. Weakley, that it was agreed, understood by everybody that the Ingram Spinning Company tanks were the tanks mentioned in this River Petroleum contract. I may be wrong about that. That was the understanding I got.

Q. You can't say whether or not that is true?

A. No, I can't.

Q. The basis of the decision that you made at that time was upon the factual situation outlined to you by Mr. Weakley?

A. I would say that is partly true, maybe entirely so, yes.

Q. In that factual situation, you were given to understand that the Government had either leased or owned the tanks?

[fol. 704] A. Well, I am afraid I can't say that that is so. I don't remember that one way or the other. There was a contract which Mr. Weakley discussed with me, and which, at the end of our conversation, I understood had the effect of permitting the avoidance of this tax. Now, I perhaps relied to considerable extent on Mr. Weakley's opinion; but as I remember it, he discussed the thing with me at some length.

Q. Now, that discussion that you are talking about having with Mr. Weakley at that time, pertained only to the Ingram Spinning Company or whatever name it was operated under?

A. Yes sir.

Q. And did not pertain to the storage of gasoline at Memphis or elsewhere by Esso Standard or Standard Oil Company?

A. I think that is correct, that Mr. Weakley and I were discussing this one facility and no other. Whether Mr. Anderson was present at that conversation, I don't remember. He may have been.

Further Deponent saith not.

George F. McCanless, by T. Roy Hix, Reporter.

Sworn to before me on the 31st day of January, 1951. T. Roy Hix, Notary Public, State at Large. My Commission expires April 6, 1954. (Seal.)

. . . The above witness claims mileage for the second time from Morristown, Tennessee, a distance of 240 miles, at the Statutory rate.

[fol. 705] STIPULATION RE DEPOSITION

The Depositions of J. D. Wallis and R. L. Weakley, witnesses for Defendant in sur-rebuttal, taken by consent at the offices of Walker & Hooker, Nashville Trust Company Building, Nashville, Tennessee, on July 20, 1951, in the presence of Mr. Harlan Dodson and Mr. Joe Brown Cummings, Counsel for Defendant, and Mr. William Waller, Counsel for Complainant.

Caption, certificate and all formalities are waived and all exceptions, save as to the form of the question, are reserved to the hearing. It is agreed that the Reporter taking the depositions may sign the names of the witnesses thereto when the same are transcribed.

DEPOSITION OF J. D. WALLIS—Filed July 25, 1951

Said witness, J. D. WALLIS, being first duly sworn, deposed as follows:

[fol. 706] Direct examination.

By Mr. Dodson:

Q. This is Mr. J. D. Wallis?
A. Yes sir.
Q. Mr. Wallis, where do you live?
A. At 203 Twenty-first Avenue, North.
Q. And are you presently employed?
A. No sir, I am retired.
Q. When did you retire, Mr. Wallis?
A. July 1, 1950.
Q. And prior to that time, for a number of years, where did you work?
A. I was with the State of Tennessee.
Q. When did you first go with the State of Tennessee?
A. July 1, 1937.

Q. And in what Department, or what Division, did you work?

A. Most of the time was in the Gasoline Tax Division.

Q. In 1943, and following, up to the time of your retirement, were you in the Gasoline Tax Division of the Department of Finance and Taxation?

A. Yes sir, with the exception of the period of Director of Accounting.

Q. And when was that?

A. As I recall, from May 1944 to September, 1946.

Q. Now, during the period of time that you were with the Gasoline Tax Division, who was in charge of that Division?

[fol. 707] A. Mr. Weakley.

Q. That is Mr. R. L. Weakley?

A. Yes sir.

Q. Did you ever make any trips to Memphis in your official capacity?

A. Yes sir.

Q. On one occasion, or several occasions?

A. On several occasions; I used to go to Memphis frequently.

Q. You were familiar, then, with the fact that Standard Oil Company of Louisiana, now Esso Standard, had tanks, storage tanks and terminal facilities at Memphis? Isn't that so?

A. Yes.

Q. For the storage of gasoline?

A. Yes sir.

Q. Do you know what use was made of certain of those storage tanks during the period of 1943, 1944, following the war years?

A. Well, they were used, of course, for storage of gasoline.

Q. Well, are you familiar with whose gasoline was stored there in some of those tanks?

A. Standard Oil gasoline.

Q. Well, do you know whether or not they were storing any gasoline for the Federal Government, the United States Army, or the Air Corps?

A. Yes, they evidently were storing it.

[fol. 708] Q. Was that matter ever discussed between you and Mr. Weakley?

A. No, he—the—State that question again, please?

Q. Was the fact that this gasoline was stored at Memphis by the Standard Oil Company for the Federal Government and the tax liability, or lack of tax liability as the result of same, was that ever discussed between you and Mr. R. L. Weakley?

A. It was discussed, yes, with Mr. Weakley. I was not in an official capacity but Mr. Weakley made several contacts with the higher-ups, that is, Commissioner McCanless and Gen. Barry. My understanding is that they discussed the matter any number of times.

Q. Did you ever receive any instructions as to whether or not, from Mr. Weakley, as to whether or not it was taxable or was not taxable?

A. Mr. Weakley,—I didn't receive any instructions about it, whether it was taxable, but Mr. Weakley has maintained that it was taxable, that is, it came to rest in Tennessee and whoever stored it was, should be, liable for the tax.

Q. Well, insofar as you knew; or so far as your discussions with him were concerned, did he ever vary from that position?

A. No.

Mr. Dodson: That is all.

Mr. Waller: No questions.

[fol. 709] Further this deponent saith not.

J. D. Wallis, by R. H. Maxson, Reporter.

Sworn to before me when taken, this July 20th, 1951.
R. H. Maxson, Notary Public at Large, State of Tennessee. (Seal.)

[fol. 710] IN THE CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted]

CHANCELLOR'S OPINION—Filed November 8, 1951

I

1. This suit was brought to recover $295,810.10 which said amount the defendant collected from the complainant as gasoline tax under Code Sections 1126, et seq., and as inspection fees provided by Code Sections 6809, et seq., stored and handled by the complainant in this State for the United States Government for the month of January 1944, together with penalties and interest thereon.

Said amount was paid under protest by the complainant on November 30, 1949, after a distress warrant had been prepared and signed by the defendant with a threat of its issuance and service.

The bill prays for a recover of the aforesaid amount, together with interest from and after November 30, 1949, and further prays for a declaratory judgment as to the rights and liabilities of the parties with respect to taxes, inspection fees, penalties and interest for the remainder of [fol. 711] the year 1944 and for the years 1945 and 1946.

It is said by counsel for the parties that if the complainant is liable for the taxes, inspection fees, penalties and interest as insisted upon by the State that the total amount involved will be well over six million dollars.

2. During the time in question the complainant was engaged in the performance of contracts with the United States Government. Under the provisions of those contracts it received considerations ranging from eighteen one-hundredths of a cent to six and three-tenths cents per gallon for receiving and storing in its own facilities, and facilities leased by it for that purpose, gasoline belonging to the United States. It was to, and did, deliver for the United States at points within the State of Tennessee or delivered it to common carriers or contract carriers employed by the United States for transportation to points without the State of Tennessee, such transportation being in accordance with directions given to complainant by the United States as provided in the contracts.

The record shows that, at no time during any of the years in question, nor at any other time until August 10, 1949, did the defendant, Commissioner of Finance and Taxation, or his predecessors in office, make any demand upon the complainant for the payment of any tax, or inspection fee, on account of this government-owned gasoline received by the complainant as above set out.

[fol. 712] The gasoline in question was received at Memphis in barges and was there inspected by the State Coal Oil or Gasoline Inspectors as provided under Sections 6809, et seq., of the Code, and reports of such inspections and reports from the complainant as to the said government-owned gasoline were filed with the Department of Finance and Taxation in regular course.

The complainant insists that it relied on the contemporaneous and continued administrative construction placed on the Tennessee gasoline tax and oil inspection laws by the State of Tennessee and its officers charged with the administration and enforcement thereof, to the effect that the government-owned gasoline received, stored and delivered by it in Tennessee was not subject to the Tennessee gasoline tax and the inspection fees later demanded by the State and paid under protest.

It is insisted by defendants that complainant was never told by any responsible authority of the State that it was free from liability for these taxes.

The fact remains, however, as hereinabove stated, that no demand was made for payment until some years after the accrual of the taxes while complainant always insisted that it was not liable.

3. Therefore, the question involved herein is the liability of the complainant, Esso Standard Oil Company, or its predecessor Standard Oil Company, for the gasoline tax and inspection fees on gasoline stored by the said Company [fol. 713] and handled by it for the United States Government, which gasoline was the property of the United States.

II

1. The record shows that such inspections as were made by the agents of the State of Tennessee of the gasoline in question were made while the gasoline rested in barges on

the Mississippi River prior to its being pumped from said barges into the storage tanks belonging to complainant.

Fees provided for in the State statutes (Section 5821) as amended, are based on the number of barrels, or fractions thereof, inspected.

The nature of this exaction has been considered by our courts in a number of cases, and it is seen that the amount of exaction largely exceeds the cost of inspection, and to that extent is an excise tax.

In State vs. N. C. & St. L. Ry., 176 Tenn. 24, the Court said:

> "This Court has long since recognized that the exaction here in question is in chief an excise tax and to a limited extent only an inspection charge. State of Tennessee v. Reed Oil Co., 176 Tenn., 10, 137 S. W. (2d), 292; State ex rel v. Jackson, 172 Tenn., 119, 110 S. W. (2d), 323. This is to say the statute assesses an excise tax on the sale, use of storage of these products [fol. 714] measured by the number of barrels sold, used or stored. This as well as some charge for inspection."

2. It is seen by this record that the customary procedure with respect to the inspection of gasoline was for the State inspector to obtain samples from the barges anchored in the Mississippi River and then seal said containers until the samples were tested, after which the complainant, Standard Oil Company, was given permission to pump the gasoline out of the barges and into its storage tanks.

The Court is, therefore, of opinion that the incidence of this inspection fee, or tax, arose before the Standard Oil Company became a storer of the government gasoline in question, and, since the complainant up to that time had not exercised the privilege of "sale, use or storage," the Court is of opinion the exaction under Code Sections 6809-6817, et seq., is not properly chargeable to the Standard Oil Company.

The Inspection Act (Code Section 6821) directs each inspector to charge the consignor, or consignee, the sum of twenty cents for testing a barrel or less quantity and twenty cents for each additional barrel.

It is insisted by the defendants that the Standard Oil Company was the consignee of the gasoline in question. The

record shows that in some instances the gasoline was consigned to an officer of the United States Government, in [fol. 715] care of Standard Oil Company at Memphis, while in other instances the consignment was filled out so as to name the Standard Oil Company, as consignee in the instrument; however, the Court is of opinion that in the true sense, Standard Oil Company was neither consignee nor consignor, but that the substance of the transaction was that the government itself was the consignee of each of these shipments, and that the Standard Oil Company was simply the contractor employed to store and handle same for the government.

3. A State excise tax could not be a valid levy against the United States Government, the owner of said gasoline, therefore the complainant is entitled to a recovery of such amounts as were paid by it for so-called inspection fees.

III

1. In considering the question of liability for the gasoline tax levied by Code Sections 1126, et seq., under the numerous decisions dealing with same, this tax must be regarded as an excise or privilege tax exacted by the State for the privilege of "Transporting . . . distributing, storing, etc. . . . for any purpose whatever."

2. There was no Act of Congress granting immunity from State and local taxes which applied in this case as was true under the majority opinion of our Supreme Court in Carbide and Carbon Chem. Corp. vs. Carson, 239 S. W. (2d), 27. [fol. 716] In that case the Court recognized that liability for State excise, or privilege taxes, exacted against a contractor with the United States Government, was valid except for immunity granted by Congressional Act.

Under the facts shown by this record, the Court is of opinion that the Standard Oil Company did exercise the privilege of storing and handling the gasoline in question belonging to the United States Government under its contracts exhibited in the record, and that, as such storer and handler of gasoline for the fees provided in the contracts, it became liable for the tax levied under the aforesaid Sections of the Code (1126, et seq.).

IV

1. On the other hand, following the course of reasoning employed by the Supreme Court, speaking through Mr. Justice Chambliss, in the case of *State of Tennessee ex rel vs. The Texas Company* in an unpublished opinion (pronounced at the December Term 1937), but more particularly on the authority of *Memphis Natural Gas Company vs. McCanless*, 180 Tenn., 695, this Court is of opinion that the complainant should not be held liable for penalties and interest in view of the facts and circumstances shown by this record and referred to hereinabove.

In Memphis Natural Gas Company vs. McCanless, supra, the Supreme Court, speaking through Mr. Chief Justice Green, said:

> [fol. 717] "This controversy is being waged in a court of equity and this Court, since East Tennessee Brewing Co. v. Currier, 126 Tenn. 535, 150 S. W. 541, has exercised the power of remitting penalties imposed upon taxpayers when the equities of the case seem to demand. See also Shipp v. Cummings, 158 Tenn. 526, 14 S. W. (2d) 747, and State et al v. Rowan et al., 171 Tenn. 612, 106 S. W. (2d) 861."

2. In connection with the question of the payment of penalties and interest it is to be observed that no levy was made by the then Commissioner of Finance and Taxation and, although the complainant, through its agents and attorneys, sought to determine whether or not the State proposed to exact gasoline taxes and inspection fees, it was never advised that such exactions would be made by the State, but on the contrary, had reason to believe that the tax authorities of the State considered that it was not liable for such taxes and inspection fees.

While it is recognized that the failure of the taxing authorities to insist upon payment of a tax does not operate as an estoppel against the State acting through subsequent officials, yet it is felt by the Court that the course of conduct pursued by the State in this instance is such that penalties and interest should not be imposed or permitted to stand in a Court of Equity.

[fol. 718] A decree in accordance with the above will be entered.

Thos. A. Shriver, Chancellor.

November 8th, 1951.

[fol. 719] IN THE CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted]

DECREE—November 26, 1951

This cause came on to be heard on this and former days of the Term upon the original bill of the complainant, Esso Standard Oil Company, the answer thereto of the Defendant, James Clarence Evans, Commissioner, etc., the intervening petition of the United States of American, the depositions on file with exhibits thereto, argument of counsel and the entire record.

From all of which it appears to the Court for the reasons set forth more fully in the Chancellor's Opinion filed in this cause, dated November 8, 1951 and hereby made a part of the record:

1. That it is proper that the complainant have and recover of the defendant, John F. Kizer, Commissioner of Finance [fol. 720] and Taxation of the State of Tennessee, the successor to James Clarence Evans, Commissioner of Finance and Taxation, the originally named defendant, the inspection fee assessed for the month of January, 1944, in the amount of $11,363.80 and the penalty and interest on the gasoline tax, said penalty being $19,684.85 and interest being $67,912.77, or a total of $98,961.42, together with interest at 6 per cent per annum from the date of payment, to wit, November 30, 1949.

2. That the complainant was liable for the gasoline tax assessed to it in the amount of $196,8[illegible]8.68 so that it is not entitled to recover this amount from the said defendant.

It is therefore, ordered, adjudged and decreed by the Court:

1. That the Chancellor's Opinion in this cause, dated November 8, 1951, be, and the same is hereby, made a part of the record in this cause.

2. That the name of John F. Kizer be substituted in the place and stead of James Clarence Evans as Commissioner of Finance and Taxation of the State of Tennessee.

3. That the complainant have and recover of the defendant, John F. Kizer, Commissioner, etc., the sum of $98,961.42, representing penalty, interest and inspection fee assessed for the month of January, 1944, under assessment dated November 30, 1949, together with interest on the same in the amount of 6 per cent per annum from November 30, 1949 to the date of this decree, amounting to $11,809.41.

[fol. 721] 4. That the defendant's right to collect and receive the $196,848.68 for gasoline tax from the complainant for the month of January, 1944, as assessed November 30, 1949 be sustained.

5. That the costs of this cause are taxed two-thirds to the complainant and one-third to the defendant, for which execution may issue if necessary.

To the foregoing action of the Court in decreeing that the complainant is entitled to recover the sum of $98,961.42 for penalty, interest and inspection fees, the defendant excepts and prays an appeal to the next term of the Supreme Court of the State of Tennessee, sitting at Nashville, which the Court is pleased to grant, the defendant not being required to execute bond.

And to the foregoing action of the Court in disallowing the complainant's claim for refund of the gasoline tax in the amount of $196,848.68 and sustaining the action of the defendant, or predecessor in office in collecting the same, and to all adverse action taken, both complainant and the intervenor except and pray an appeal to the next term of the Supreme Court of the State of Tennessee, sitting at Nashville, which appeal is granted to the intervenor, the United States of America, without condition, but is granted to the complainant, Esso Standard Oil Company, only on the condition that the complainant execute and file with the Clerk of the Court an appeal bond in the amount of $250.00, conditioned as provided by law.

[fol. 722] It is further ordered by the Court that the exhibits in this cause will be sent up in their original form.

O. K. for Entry:

William Waller, Solicitor for Complainant.

Joe Brown Cummings.
Walker & Hooker.
By K. Harlan Dodson, Jr., Solicitors for Defendant.
Berryman Green, Solicitor for Intervening Petitioner.

[fol. 723] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 724-727] Justice's Certificate (omitted in printing).

[fol. 728] IN THE SUPREME COURT OF THE STATE OF TENNESSEE

Davidson Equity

ESSO STANDARD OIL COMPANY AND UNITED STATES OF AMERICA, Appellants,

v.

JAMES CLARENCE EVANS AND HIS SUCCESSORS IN OFFICE AS COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE, Appellee

PETITION FOR APPEAL OF UNITED STATES, INTERVENOR—October 2, 1952

Considering itself aggrieved by the final decree and judgment of this Court entered June 7, 1952, and order denying petition for rehearing entered on July 11, 1952, the United States of America, intervenor, does hereby pray that an appeal be allowed to the Supreme Court of the United States from said final decree and judgment and order denying the petition for rehearing and from each and every part thereof; that citation be issued in accordance with law; and that the material parts of the record, proceedings and papers upon which such said final judgment and decree and order denying petition for rehearing were based, duly authenticated, be sent to the Supreme Court of the

United States in accordance with the rules in such cases made and provided.

Respectfully submitted, Robert L. Stern, Acting Solicitor General.

October 2, 1952.

[fol. 729] IN THE SUPREME COURT OF THE STATE OF TENNESSEE

[Title omitted]

ORDER ALLOWING APPEAL OF UNITED STATES OF AMERICA, INTERVENOR—October 2, 1952

The United States of America, intervenor, having made and filed its petition praying for an appeal to the Supreme Court of the United States from the final judgment and decree of this Court in this cause entered June 7, 1952, and order denying a petition for rehearing entered July 11, 1952, and from each and every part thereof, and having presented its assignment of errors and prayer for reversal and its statement as to the jurisdiction of the Supreme Court of the United States on appeal, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

Now, therefore, it is hereby ordered that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that citation shall issue in accordance with law.

A. B. Neil, Chief Justice.

October 2, 1952.

[fol. 730] Citation in usual form showing service on K. Harlan Dodson, Jr., omitted in printing.

[fol. 731] IN THE SUPREME COURT OF THE STATE OF TENNESSEE

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—October 2, 1952

The United States of America, intervenor in the above-entitled cause, in connection with its appeal to the Supreme Court of the United States, hereby files the following assignment of errors upon which it will rely in its prosecution of said appeal from the final judgment and decree of the Supreme Court of Tennessee, entered June 7, 1952, and its order denying the petition to rehear, entered July 11, 1952.

The Supreme Court of Tennessee erred:

1. In failing to hold that the Tennessee gasoline tax law (Secs. 1126, et seq. of the Code of Tennessee (1932), as amended), as construed and applied here to require the inclusion in the measure of the gasoline tax payable by Esso Standard Oil Company of gasoline owned by the United States, violates the Constitution of the United States and is void as in effect imposing a tax on property and an instrumentality of the Federal Government.

[fol. 732] 2. In failing to hold that the Tennessee gasoline tax, as assessed here, is illegal and void under the Constitution of the United States as a tax on property and an instrumentality of the Federal Government.

3. In holding that, as applied here, the Tennessee gasoline tax law imposes a privilege tax on the business of storing gasoline and not a tax on Federally-owned gasoline, and that the tax assessed here was a privilege tax on Esso Standard Oil Company's business of storing gasoline and not a tax on Federally-owned gasoline.

4. In failing to hold that the Tennessee gasoline tax law, as construed and applied here, invalidly discriminates against the United States and Esso Standard Oil Company, contrary to the Equal Protection Clause of the Fourteenth Amendment, the Supremacy Clause, and the implied constitutional immunity of the Federal Government and those who deal with it from discrimination by the States, in that

said law imposes a tax here, with respect to Federally owned gasoline, in circumstances in which the same tax would not be imposed if the gasoline were owned by a private person other than the distributor or storer.

5. In failing to hold that the Tennessee gasoline tax, as assessed here, invalidly discriminates against the United States and Esso Standard Oil Company on the grounds stated in the preceding assignment of error.

6. In affirming the judgment of the Chancery Court insofar as it gave judgment against Esso Standard Oil Company and the United States.

[fol. 733] The United States also adopts as its own the Assignment of Errors heretofore filed by Esso Standard Oil Company.

Wherefore, intervenor United States of America prays that the final judgment and decree of the Supreme Court of Tennessee be reversed, and for such other relief as the Court may deem fit and proper.

Robert L. Stern, Acting Solicitor General.

October 2, 1952.

[fols. 734-735] Service of Appeal Papers under Rule 12 (omitted in printing).

[fol. 736] Praecipe for record (omitted in printing).

[fol. 737] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 738-740] Justice's Certificate (omitted in printing).

[fol. 741] [File endorsement omitted]

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 330

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON—Filed September 17, 1952

Appellant, Esso Standard Oil Company, adopts for its statement of points upon which it intends to rely in its appeal to this Court the points contained in its assignment of errors heretofore filed.

William Waller, Counsel for Appellant, American Trust Building, Nashville 3, Tennessee.

I, William Waller, certify that I have served a copy of this document upon counsel for appellee.

This September 15, 1952.

William Waller.

[fols. 742-744] [File endorsement omitted]

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 378.

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed October 8, 1952.

a. Appellant United States adopts for its statement of points upon which it intends to rely in its appeal to this Court the points contained in its Assignment of Errors heretofore filed.

b. Appellant United States adopts the stipulation as to printing of the record, dated September 15, 1952, between appellant Esso Standard Oil Company and appellee, here-

tofore filed in No. 330, and designates for printing the portions of the record agreed in that stipulation to be printed.

Robert L. Stern, Acting Solicitor General.

October 8, 1952.

[fol. 745] [File endorsement omitted]

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION—Filed September 17, 1952

It is hereby stipulated and agreed by and between counsel for the respective parties to the above entitled cause that:

The entire record shall be printed except that there shall be omitted:

(1) Articles 4-23, inclusive, and Exhibit B of the service contracts filed as complainant's Exhibits 2, 3 and 35, and as defendant's Exhibit 1, with explanation where such omissions occur that the portions omitted are substantially identical with the corresponding portions of the service contract filed as complainant's Exhibit 1.

(2) From complainant's Exhibits 36, 37 and 38 the sheets accompanying the invoices showing the dates, billing references and other details of each delivery of aviation gasoline.

(3) The briefs filed in the Supreme Court of Tennes- [fols. 746-748] see, except that the petition to rehear and reply shall be included.

It is further stipulated and agreed that any of the parties may refer in their briefs and argument to the record filed in the Supreme Court of the United States, including any part thereof which has not been printed.

William Waller, Counsel for Appellant. K. Harlan Dodson, Jr., Counsel for Appellee.

September 15, 1952.

[fols. 749-750] SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1952

No. 330

ORDER NOTING PROBABLE JURISDICTION—November 10, 1952

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is consolidated for argument with No. 378, United States of America vs. Evans, Commissioner, etc.

[fols. 751-752] SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1952

No. 378

ORDER NOTING PROBABLE JURISDICTION—November 10, 1952

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is consolidated for argument with No. 330, Esso Standard Oil Co. v. Evans, Commissioner, etc.

SUPREME COURT, U.S.

Vol. II

EXHIBITS

TRANSCRIPT OF RECORD

(Pages 329 to 501)

Supreme Court of the United States

OCTOBER TERM, 1952

No. 330

ESSO STANDARD OIL, APPELLANT,

vs.

JAMES CLARENCE EVANS, COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE, ET. AL.

No. 378

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

JAMES CLARENCE EVANS, COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE, ET AL.

APPEALS FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

No. 330—FILED SEPTEMBER 11, 1952

No. 378—FILED OCTOBER 6, 1952

Probable Jurisdiction Noted November 10, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 330

ESSO STANDARD OIL, APPELLANT,

vs.

JAMES CLARENCE EVANS, COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE, ET AL.

No. 378

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

JAMES CLARENCE EVANS, COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE, ET AL.

APPEALS FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

VOL. II

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JAN. 16, 1953.

—5917

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[fol. 753-754] COMPLAINANT'S EXHIBIT #1

UNITED STATES OF AMERICA

Department of the Air Force

Dayton, Ohio, 24 March 1950.

I hereby certify that the attached documents are true copies of copies of Contract No. W 33-038 ac-1683 and Supplemental Agreement No. 1 thereto on file in the Air Materiel Command Contract Research and Development Depository, Base Adjutant's Office, Wright-Patterson Air Force Base, Dayton, Ohio. I further certify that said documents are part of the official files of the United States of America.

Hugh J. White, Captain, USAF.

I hereby certify that Hugh J. White, Captain, USAF, who signed the foregoing certificate, is the Assistant Adjutant and Base Records Officer, Wright-Patterson Air Force Base, Dayton, Ohio, and that to his certification as such full faith and credit are and ought to be given.

In testimony whereof I, W. Stuart Symington, Secretary of the Air Force, have hereunto caused the seal of the Department of the Air Force to be affixed and my name to be subscribed by the Administrative Assistant to the Secretary of the Department, at the City of Washington, this 30th day of March, 1950.

W. Stuart Symington, Secretary of the Air Force.
By Ernest Krom, Deputy Administrative Assistant. (Seal.)

[fol. 755] Contract No. W 33-038 ac-1683 (11557)

AFP: 50419 A

Class: 06 A

Approved: 1 March 1944. By Direction of the Secretary of War Under the Provisions of the First War Powers Act, 1-41, and Executive Order No. 9001, December 27, 1941.

Fixed Price Service Contract (Army Air Forces) NB:mls

(S.) D. C. Swatland, Colonel, Air Corps, Chief, Procurement Division, Materiel Command.

WAR DEPARTMENT

Contractor: Standard Oil Company of Louisiana.

Contract For: Storage, Handling, Receiving and Transporting and Delivery of Aircraft Engine Fuel.

Place: Army Air Forces, Materiel Command, Wright Field, Dayton, Ohio.

The Finance Officer, U. S. Army, Mutual Home Building, 120 West Second Street, Dayton, Ohio, is designated as the officer to make payments in accordance with this contract.

The services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to the allotment below enumerated, the available balance of which is sufficient to cover the cost thereof.

2-4006 P 412-07 A 212/40705

Funds not to exceed $533,993.70 have been obligated for payment for the performance of services called for under the terms of this contract.

[fol. 756] FIXED PRICE SERVICE CONTRACT*

Army Air Forces
War Department

This contract entered into this 30th day of December, 1943, by and between The United States of America, hereinafter called the "Government", represented by the Contracting Officer executing this contract, and Standard Oil Company of Louisiana, a corporation organized and existing under the laws of the State of Louisiana, having a place of business in the City of New York, in the State of New York, hereinafter called the "Contractor".

WITNESSETH

Whereas, in the prosecution of its war effort, the Government deems it necessary to contract with various individuals, firms, associations, or corporations, for the storage and handling of aviation fuel and the rendering of miscel-

* This contract was negotiated under the authority of the First War Powers Act, 1941, and Executive Order No. 9001, December 27, 1941.

laneous services in connection therewith at strategically situated locations throughout the United States, and

Whereas, it has been administratively determined that established facilities of the Government are inadequate to provide these essential services and therefore the execution of such agreements will promote the interests of the Government, and

Whereas, the Contractor represents that it is the owner of and/or can provide storage and handling facilities adequate for the storage and handling of Government-owned aviation fuel under this contract, and possesses the means and ability to perform other necessary services in connection therewith,

Now, therefore, in consideration of the premises and of the mutual covenants and agreements herein contained and for other good and valuable considerations, the parties hereto agree as follows:

Article 1—Scope of This Contract

(a) The Contractor shall furnish and supply to the Government storage and handling facilities in the capacities, at the points, and for the prices indicated in Exhibit "A", which is hereto attached and hereby made a part hereof and shall render services in connection therewith, as hereinafter more particularly described, in receiving, storing, handling and loading Government-owned fuel (the word "fuel" as used hereinafter shall mean Government-owned fuel unless otherwise specified) of the grade or grades indicated in said Exhibit "A". Said services shall be performed when and as, during the period or periods indicated in said Exhibit "A", the Government shall request and direct the Contractor to supply the same. Said services shall be as follows:

[fol. 757] (1) To order stocks of fuel to be shipped to Contractor's storage facilities as may be directed by the Contracting Officer.

(2) To receive such stocks of fuel into such storage facilities, and store the same as may be directed by the Contracting Officer.

(3) To load and ship such stocks of fuel from such

storage facilities as may be directed by the Contracting Officer.

(4) To keep a complete and adequate record of and, if necessary, to trace and expedite all shipments on orders placed and on loadings made by the Contractor as directed under the terms hereof.

(5) To render reports as of 0800 o'clock daily, by telegraph or telephone, at the expense of the Government, giving the following information pertaining to each terminal (storage from which shipments are regularly made to more than one point):

(a) Total amount of each grade of fuel shipped during the preceding twenty-four (24) hours.

(b) Tank car numbers by grade to each destination.

(c) Balances of each grade of fuel on hand at the close of the twenty-four (24) hours covered by the report.

(6) To render reports in duplicate by mail (air mail if normal mailing time is over twenty-four (24) hours covering in detail receipts, shipments and losses or gains for the following periods of each month: First to eighth, inclusive; ninth to fifteenth, inclusive; sixteenth to twenty-third, inclusive, and twenty-fourth to the last day thereof, inclusive. This quarter monthly report shall contain all the information provided for in and shall be prepared as an affidavit on "Government Owned Stock Report", Air Service Command Form No. 2013. Upon request of the Contractor directed to the Property Officer, Fuels and Lubricants Branch, Air Service Command, Patterson Field, Fairfield, Ohio, blank forms No. 2013 will be made available to the Contractor.

[fol. 758] (7) To render any additional reports in such other form or fashion as may be directed in writing by the Property Officer, Fuels and Lubricants Branch, Air Service Command, Patterson Field, Fairfield, Ohio, relating to the reporting of stock balances, receipts, loadings, deliveries and stock losses or gains.

(8) To provide and maintain adequate equipment

and personnel sufficient for proper storage and efficient handling of all shipments received and loadings made which may be called for under the terms hereof and to accomplish all such services in accordance with the best standard commercial practices.

(b) Contractor shall make necessary preparations or alterations in the loading and unloading facilities at its storage point or points in order to perform efficiently the services rendered hereunder in accordance with standard commercial practice, and shall clean and/or condition or recondition said facilities to make them suitable for the handling of aviation fuel.

(c) The Contractor shall exercise due diligence in placing such orders and making such deliveries as may be directed under the terms of Paragraph (a) hereof and shall accomplish the receipt and delivery of such stocks of fuel within a reasonable time after receipt of instructions from the Contracting Officer therefor. Contractor shall have the responsibility of maintaining stocks of fuel in its storage facilities sufficient to meet through-put requirements, provided that the fuel is available and allocated at the refineries or sources thereof and provided transportation facilities are adequate.

(d) Contractor shall provide a responsible source of contact twenty-four hours a day, seven days a week, at or near the storage facilities referred to in Exhibit "A" for the purpose of receiving such instructions as may be issued under the terms of this contract and the Contractor shall immediately, upon execution of the contract, provide the Commanding General, Air Service Command, Patterson Field, Fairfield, Ohio, Attention: Property Officer, Fuels and Lubricants Branch, with the name or names, addresses and telephone numbers of the respective responsible parties assigned to such storage facilities.

[fol. 759] (e) Contractor shall be responsible, until delivery thereof has been accomplished, for the total gallonage received at its storage facilities on the basis of volume, determined as hereinafter set forth, corrected to 60° F.:

(1) Receipts made from tank wagon or tank truck (of under 4000 gallons capacity): On an actual volume basis, without temperature correction,

(2) Receipts made from tank car or tank truck (of 4000 gallons capacity or more): on a volume basis corrected to 60° F.

Provided that if any such conveyance referred to in (1) or (2) shows, after proper gauging, a volume, corrected to 60° F. when required hereunder, in excess of one per cent (1%) less than the volume, similarly corrected, shipped as the same appears on the bill of lading or equivalent shipping document, the Contractor shall, jointly with the local freight agent or truck operator, and the Army Air Forces Inspector in charge, if available, determine the actual shortage or loss, and the Contractor shall notify the Commanding General, Air Service Command, Patterson Field, Fairfield, Ohio, Attention: Property Officer, Fuels and Lubricants Branch, by telegram of the amount of shortage and the reason therefor, if known. In case of any such shortage the Contractor shall sign the bill of lading or equivalent shipping document for the actual quantity received and not for the quantity shipped. As used in (1) and (2) hereof the words "volume basis" mean volume measured by gauge, if any, on said conveyance and if none, then by gauge on Contractor's receiving facilities.

(3) Receipts made from tanker, barge or other vessel: on a volume basis corrected to 60° F.

Provided that such vessel and the receiving shore tanks shall be gauged jointly by the Contractor, the master of the vessel and the Army Air Forces Inspector in charge, if available, before the unloading of the vessel and again after such unloading; in the event that the volume, corrected to 60° F., received by the Contractor is in excess of one per cent (1%) less than the volume, corrected to 60° F., shipped in such vessel as appears on the applicable shipping document, the actual shortage or loss shall be determined by the aforementioned parties and the Contractor shall notify the Commanding General, Air Service Command, Patterson Field, Fairfield, Ohio, Attention: Property Officer, Fuels and

Lubricants Branch, by telephone of the amount of such shortage and the reason therefor, if known. In case of such shortage, the Contractor shall sign the Marine bill of lading or applicable shipping document for the actual quantity received and not for the quantity shipped.

[fol. 760] (f) Contractor shall be allowed not to exceed one per cent (1%) for any loss of volume in fuel for each through-put at its storage facilities and the amounts of such losses shall be indicated on the monthly reports called for under Paragraph (a) (7) hereof. In the event of any shortages or losses in excess of the limitations herein imposed, the Contractor shall submit to the Property Officer herein named, a statement of such losses within ten (10) days after the date of expiration or termination of this contract, together with the reasons therefor, if known; and the Contractor shall not be liable, under the terms hereof, for such excessive shortages or losses unless the same result from gross negligence, bad faith, or willful misconduct on the part of one or more of the Contractor's corporate officers or other representatives having supervision or direction of the operation of the whole of the Contractor's business or of the whole of any terminal or bulk plant or storage facilities operated by the Contractor and used in the performance of this contract.

(g) All shipments made by common carrier under the terms hereof either to or from Contractor's storage facilities shall be made on Government bills of lading. Contractor shall mail applications for such Government bills of lading to the Commanding General, Air Service Command, Patterson Field, Fairfield, Ohio, Attention: Property Officer, Fuels and Lubricants Branch. In the event that the Contractor is instructed, under the terms of this contract, to ship fuel on collect commercial bills of lading for conversion to Government bills of lading, the original and two (2) memorandum copies of such collect commercial bills of lading will be mailed to the Transportation Officer at destination and upon shipments to destinations where there is no Transportation Officer regularly assigned; such as terminals or other activities, the above-mentioned col-

lect commercial bills of lading shall be mailed to the Commanding General, Air Service Command, Patterson Field, Fairfield, Ohio, Attention: Commercial Transportation Section, where such bills of lading will be converted to Government bills of lading.

(h) In the event Contractor violates any instructions as to delivery of fuel out of its storage facilities, either as to method, date, quantity, destination or grade, or otherwise, which may be specified under the terms hereof, the transportation costs involved in such unauthorized delivery shall be deducted from amounts otherwise due the Contractor hereunder.

(i) The parties agree the services described herein, if any, heretofore performed by the Contractor, at the request of the Government, were in contemplation of and are subject to the provisions of this contract, the same as though performed by the Contractor after the date of execution hereof.

(j) All reports called for under the terms of this Article shall be made to the Commanding General, Air Service Command, Patterson Field, Fairfield, Ohio, Attention: Property Officer, Fuels and Lubricants Branch.

[fol. 761] Article 2—Consideration

The Government will pay to the Contractor, upon satisfactory performance of the services herein specified, the prices set forth in Exhibit "A" during the period specified therein or any extension or renewal thereof, if such extension or renewal is provided for elsewhere in this contract. For payment purposes the gallonage handled by Contractor through its storage facilities shall be determined as follows:

(1) Upon loadings made into tank wagon or tank truck (under 4000 gallons capacity): on an actual volume basis without temperature correction.

(2) Upon bulk loadings by any other means (4000 gallons capacity or more): on a volume basis corrected to 60° F.

(3) As used in (1) and (2), the words "volume basis" mean volume measured by gauge, if any, on said conveyance or vessel and if not, then by gauge on Contractor's delivering facilities.

Article 3—Inspection and Acceptance for Payment

(a) The points of inspection and acceptance for payment by the Government for the services called for hereunder shall be the respective points at which such services are completed.

(b) Payment will be made by the Government upon receipt of the following:

(1) Invoices properly prepared and certified. Invoices shall be prepared in quadruplicate and addressed to the Finance Officer at the location designated on the cover page hereof. Such invoices shall be serially numbered and dated, and shall include the contract number, the grade and specification number of the material, consignee, shipping containers (tank trucks, tank cars, etc.), date of shipment, bill of lading number, where applicable, gallonage of material computed as specified herein, and the unit prices therefor. The original and first copy of each invoice shall be mailed direct to said Finance Officer. The triplicate and quadruplicate copies shall be mailed direct to the Accountable Officer, designated in Article 8 hereof. The Accountable Officer will prepare necessary certificates for services and will forward such papers with the triplicate copy of the invoice to said Finance Officer for payment.

[fol. 762] (2) Reports rendered in duplicate by first-class mail, four (4) times per month as specified elsewhere in this contract. These reports shall be dispatched with and to the same addresses as the triplicate and quadruplicate copies of the invoices in subparagraph (1) above.

(3) Certificates in duplicate containing all the information provided for in the form specified in Exhibit "B", which is hereto attached and hereby made a part hereof. These certificates shall be prepared on letter sized paper 8" x 10½", and shall be distributed on the same date upon which containers are loaded and/or released as follows:

Original copy to:

Consignee, properly addressed and forwarded immediately upon the loading of the conveyances. In case

of tanker or barge shipment such certificates shall be given to the captain or master of the vessel. In the case of tank car shipment the certificate shall be placed in a sealed envelope and sent by first-class mail. In case of truck shipment such certificate shall be placed in a sealed envelope and entrusted to the driver of such truck.

Duplicate copy to:

Army Air Forces Inspector (Fuel and Oil) if such inspector is assigned to Contractor's facilities. If no inspector is so assigned the certificate shall be mailed to the Commanding General, Materiel Command, Wright Field, Dayton, Ohio, Attention: Fuels, Lubricants and Chemicals Branch, Inspection Division.

(c) The Government reserves the right to inspect and approve the procedure used at Contractor's storage facilities in inspecting, cleaning and sealing containers used for shipment of the above-mentioned fuel. In addition, any Contractor's storage facilities which possess laboratory facilities as of the date of this contract shall accomplish specification test of the fuel whenever required by Army Air Forces Inspector (Fuel and Oil).

Article 4—Delivery Conditions

(a) Contractor shall carefully inspect any and all equipment prior to loading to insure that such equipment is sufficiently clean to avoid contamination of the fuel. In the event any tank car, in which the last contents have been com- [fol. 763] modities other than aircraft engine fuel, requires cleaning, Contractor shall accomplish same, and the reasonable cost thereof, as determined by the Contracting Officer, shall be borne by the Government and the same shall be entered by Contractor on invoices as a separate item. In the event any barge or tanker, furnished to the Contractor, is found by the Contractor, after proper inspection, to be insufficiently clean to receive the fuel, the Contractor shall immediately notify the Fuels and Lubricants Branch, Air Service Command, Patterson Field, Fairfield, Ohio, and obtain instructions as to procedure to be followed.

(b) Any and all equipment employed by the Contractor for the transportation of the stocks of fuel shall be adequately sealed immediately after loading and the serial number of the seal shall be indicated on the bill of lading or equivalent shipping document and also on the inspection certificates, in order that the serial numbers may be checked by consignee prior to unloading the fuel at destination.

Article 5—Changes

The Contracting Officer may at any time by a written order, issue additional instructions, require additional services or direct the omission of services covered by this contract and Exhibit "A" will be amended accordingly. If such changes cause a material increase or decrease in the amount or character of the work to be performed under this contract or in the time required for its performance, an equitable adjustment of the fixed prices to be paid to the Contractor shall be agreed upon and the contract shall be modified in writing accordingly. Any claim for adjustment under this Article must be asserted within thirty (30) days from the date the change was ordered; Provided, however, that the Contracting Officer, if he determines that the facts justify such action, may receive, consider, and adjust any such claims asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Article 16 hereof, but nothing provided in this Article shall excuse the Contractor from proceeding with the contract as changed.

Article 6—Delays-Damages

(a) If the Contractor refuses or fails to furnish any or all of the services herein provided for with promptness and diligence, or defaults in the performance of any of the agreements herein contained, the Government, subject to the provisions of paragraph (b) below, may by notice in writing from the Contracting Officer to the Contractor of the intention to terminate under this Article, terminate this contract. Such termination shall be without prejudice to any claims which the Government may have against the Contractor. Upon receipt of the above-mentioned notice the Contractor

shall make deliveries of stocks on hand as may thereafter be directed by the Contracting Officer.

(b) Upon termination of this contract as hereinbefore provided the Contractor shall be paid any sum due to the Contractor for services performed under the terms hereof up to the date of such termination, and shall thereafter be [fol. 764] paid any sums which, at the prices specified herein, may become due for the storage and handling of such Government-owned fuel as may be on hand on the date of such termination. Any such payments shall be without prejudice to any claim which the Government may have against the Contractor, provided, that the obligation of the Government to make any of the payments required by this paragraph shall be subject to any claim which the Government may have against the Contractor under or in connection with this contract.

(c) The Government shall not have a right of termination under this Article if the delay of the Contractor in furnishing services is an excusable delay as hereinafter defined. The Contracting Officer shall ascertain the cause of the delay, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject to appeal within thirty days by the Contractor to the Secretary of War or his duly authorized representative, whose decision on such appeal as to the cause of delay shall be final and conclusive on the parties hereto. The term "excusable delay" as used in this paragraph means any delay which results without fault or negligence on the part of the Contractor and which is due to unforseeable causes beyond his control including, without being limited to, acts of God or of the public enemy, any preference, priority or allocation order issued by the Government or any other act of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes and unusually severe weather.

(d) Upon such termination of this contract, all quantities of Government-owned fuel which cannot be pumped from Contractor's tanks, the same commonly being known as "tank bottoms", shall be disposed of as may thereafter be directed by the Contracting Officer.

Article 7—Inspection and Audit of Books

(a) The Contractor agrees that all of its storage facilities and all of its accounting records and books applicable to this contract shall at all times be subject to inspection and audit by any person designated by the head of any executive department of the Government. See also Title XIII, Section 1301, "Second War Powers Act, 1942".

(b) All information obtained from the Contractor's records shall be treated as confidential.

Article 8—Property Accountability

The Property Officer, Fuels and Lubricants Branch, Air Service Command, Patterson Field, Fairfield, Ohio, or such other property officer at any location as may be designated in writing by the Commanding General, Air Service Command, or by other competent authority, is designated as the officer to maintain the necessary property records in connection with this contract as contemplated by applicable Army Regulations.

[fol. 765] Article 9—Provisions Reference Public Work or Service

Under the authority of the act approved April 29, 1941 (Public No. 43, 77th Congress), the furnishing of performance and payments bonds required by the act of August 24, 1935 (49 Stat. 793) is hereby waived.

Article 10—Anti-discrimination

(a) The Contractor, in performing the work required by this contract, shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin.

(b) The Contractor agrees that the provision of paragraph (a) above will also be inserted in all of its subcontracts. For the purpose of this Article, a subcontract is defined as any contract entered into by the Contractor with any individual, partnership, association, corporation, estate, or trust, or other business enterprise or other legal entity, for a specific part of the work to be performed in connection with the supplies or services furnished under this contract;

Provided, however, that a contract for the furnishing of standard or commercial articles or raw material shall not be considered as a subcontract.

Article 11—Officials not to Benefit

No member of or delegate to Congress or resident commissioner shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article 12—Secrecy

(a) The Contractor agrees to be responsible in matters within its control for the safeguarding of all Secret, Confidential or Restricted matters that may be disclosed or that may be developed in connection with the work under this contract and to require a similar agreement of all subcontractors and agents of the Contractor to whom any work or duty relating to this contract may be allotted.

(b) The Contractor agrees to file no application for registration under the Securities Act of 1933, as amended, containing any reference to this contract or to its terms and provisions without first securing the consent of the War Department. Requests for such consent will be addressed to the Contracting Officer.

Article 13—Covenant Against Contingent Fees

The Contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such com- [fol. 766] mission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

Article 14—Liability for Government-owned Property

Except as to the property the liability for which is fixed by any other instrument or agreement or by some other provision of this contract, the Contractor shall not be liable for loss or destruction of or damage to property of the Government in the possession or control of the Contractor in connection with this contract (including but not limited to Government stocks of fuel stored or handled by the Contractor) unless such loss, damage or destruction results from willful misconduct or failure to exercise good faith on the part of one or more of the Contractor's corporate officers or other representatives having supervision or direction of the operation of the whole of the Contractor's business or of the whole of any terminal or bulk plant operated by the Contractor and used in the performance of this contract.

Article 15—Termination for the Convenience of the Government

(a) The Government may, at any time, terminate this contract by notice in writing from the Contracting Officer to the Contractor that the contract is terminated under this Article. Such termination shall be effective in the manner and upon the date specified in said notice and shall be without prejudice to any claims which the Government may have against the Contractor, or any claims which the Contractor may have against the Government. The Contractor shall make deliveries of stocks on hand on the date of termination specified in said notice as may thereafter be directed by the Contracting Officer.

(b) Upon termination of this contract as hereinbefore in this Article 15 provided, the Contractor shall be paid any sum then due to it for services performed under the terms hereof up to the date of such termination and shall thereafter be paid any sums which, at the prices specified in this contract, may become due for the storage and handling of such Government-owned fuel as may be on hand as of the date of termination. Any such payments shall be without prejudice to any claim which the Government may have against the Contractor, Provided, that the obligation of the Government to make any of the payments required by this paragraph shall be subject to any claim which the Govern-

ment may have against the Contractor under or in connection with this contract.

(c) Upon the making of the payments called for by this Article, all obligations of the Government to make further payments or to carry out other obligations shall cease forthwith and forever.

(d) Upon termination or completion of this contract all quantities of Government-owned fuel which cannot be pumped from Contractor's tanks, the same commonly being known as "tank bottoms", shall be disposed of as may thereafter be directed by the Contracting Officer.

[fol. 767] Article 16—Disputes

Except as otherwise specifically provided in this contract, all disputes concerning questions of fact which may arise under this contract, and which are not disposed of by mutual agreement, shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail a copy thereof to the Contractor at his address shown herein. Within 30 days from said mailing the Contractor may appeal in writing to the Secretary of War, whose written decision or that of his designated representative or representatives thereon shall be final and conclusive upon the parties hereto. The Secretary of War may, in his discretion, designate an individual, or individuals, other than the Contracting Officer, or a board as his authorized representative to determine appeals under this Article. The Contractor shall be afforded an opportunity to be heard and offer evidence in support of his appeal. The president of the board, from time to time, may divide the board into divisions of one or more members and assign members thereto. A majority of the members of the board or of a division thereof shall constitute a quorum for the transaction of the business of the board or of a division, respectively, and the decision of a majority of the members of the board or of a division shall be deemed to be the decision of the board or of a division, as the case may be. If a majority of the members of a division are unable to agree on a decision or if within 30 days after a decision by a division, the board or the president thereof directs that the decision of the division be reviewed by the board, the decision will be

so reviewed, otherwise the decision of a majority of the members of a division shall become the decision of the board. If a majority of the members of the board is unable to agree upon a decision, the president will promptly submit the appeal to the Under Secretary of War for his decision upon the record. A vacancy in the board or in any division thereof shall not impair the powers nor affect the duties of the board or division nor of the remaining members of the board or division, respectively. Any member of the board, or any examiner designated by the president of the board for that purpose, may hold hearings, examine witnesses, receive evidence and report the evidence to the board or to the appropriate division, if the case is pending before a division. Pending decision of a dispute hereunder the Contractor shall diligently proceed with the performance of this contract. Any sum or sums allowed to the Contractor under the provisions of this Article shall be paid by the United States as part of the cost of the articles or work herein contracted for and shall be deemed to be within the contemplation of this contract.

Article 17—Definitions

(a) The term "Secretary of War" as used herein shall include the Under Secretary of War, and the term "his duly authorized representative" shall mean any person or board authorized to act for him other than the Contracting Officer.

(b) Except for the original signing of this contract, and except as otherwise stated herein, the term "Contracting Officer" as used herein shall include his duly appointed successor or his authorized representative.

[fol. 768] Article 18—Taxes

(a) Unless otherwise indicated in this contract, (A) the prices herein do not include any of the following taxes in effect at the date of this contract:

(1) Any Federal tax which is directly applicable to the completed supplies or work covered hereby (including component parts, articles, or units of which the Contractor is the manufacturer, importer or producer) and as to which exemption from tax is available, or

(2) Any state or local sales or use tax directly applicable to the completed supplies or work covered hereby, and any other state or local tax from which an exemption is available for purposes of this contract, and

(B) the prices herein include all other applicable Federal, state and local taxes in effect at the date of this contract. Upon request of the Contractor the Government will issue tax exemption certificates or furnish other similar proof of exemption with respect to all taxes excluded from the price. If any such certificate or proof of exemption with respect to a state or local sales or use tax directly applicable to the completed supplies or work covered hereby is not acceptable to the state or local taxing authorities and the Contractor is required to pay any such tax, then the prices named herein will be increased accordingly and any amount due to the Contractor as a result of such increase will be charged to the Government and entered on vouchers (or invoices) as a separate item, subject, however, to the provisions of paragraph (c) of this Article.

(b) If after the date of this contract the Federal Government or any state or local Government shall impose, remove or change (including any change by the removal by statute of an exemption available to the Contractor for the purposes of this contract) any duty, sales, use or excise tax or any other tax or charge directly applicable to the supplies or work covered hereby or the materials used in the manufacture thereof or directly upon the importation, production, processing, manufacture, construction, sale or use of such supplies, work or materials, which tax or charge must be borne by the Contractor because of a specific contractual obligation or by operation of law, or, in case of a decrease or elimination of any such tax, where the Contractor is relieved to that extent, and if in case of an increase in such an existing tax or the imposition of such a new tax the Contractor has paid such tax or charge to the Federal Government or to a state or local Government, or any other person, then the prices named herein will be increased or decreased accordingly and any amount due to the Contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as a separate item: Provided, however, that the Govern-

ment reserves the right to issue to the Contractor in lieu of such payment a tax exemption certificate or certificates acceptable to the Federal Government or state or local Government, as the case may be. The amount of any adjustment pursuant to this paragraph (b) may be deter- [fol. 769] mined by a written agreement between the parties hereto. Nothing contained herein shall be construed as requiring the Government to reimburse the Contractor for any Federal, state, or local income taxes, income surtaxes or excess profits taxes, or taxes on property.

(c) In the case of any state or local tax or charge which the Contractor contends is chargeable to the Government because of the provisions of this Article, or any other provision of this contract, the Contractor agrees to refrain from paying any such tax or charge upon the direction of the Contracting Officer (in which event the Government will save the Contractor harmless from penalties and interest incurred through compliance with the direction of the Contracting Officer not to pay such tax); to take such steps as may be directed by the Government to cause such tax or charge to be paid under protest; to preserve and, if so directed by the Contracting Officer, to cause to be assigned to the Government any and all rights to the abatement or refund of such tax or charge; if so requested, to permit the Government to prosecute any claim, litigation or proceeding for the refund of such tax in the name of the Contractor, and to furnish to the Government all reasonable assistance and cooperation requested by the Government in any litigation or proceeding for the recovery of such tax or charge.

(d) Contractor represents that, except as stated below, (1) no Federal, state or local tax on the storage or transportation of Government-owned property called for hereunder or on amounts to be paid by the Government for such storage or transportation, and (2) that no Federal, state or local excise tax on warehousemen, contract carriers, carriers for hire or common carriers applicable to the services called for hereunder, or the amounts paid for such services is included in the prices herein; and the Government agrees, on request of the Contractor, to issue a tax exemption certificate or certificates or other proof of exemption acceptable to the Federal, state or local Government,

as the case may be, with respect to any such Federal, state or local tax heretofore or hereafter imposed. In the event that such certificates or other proof of exemption is not acceptable to the Federal, state or local Government, as the case may be, and if the Contractor is required to bear any such tax, heretofore or hereafter imposed, because of a specific contractual obligation, or by operation of law, then except as stated in the last proviso of this sentence, the prices named herein will be increased accordingly and any amount due to the Contractor will be charged to the Government and entered on vouchers (or invoices) as a separate item; Provided, that the Contractor agrees to take such steps as may be requested by the Government to cause such tax to be paid under protest, to preserve and to cause to be assigned to the Government any and all rights to the refund of such tax, and to furnish to the Government all reasonable assistance and cooperation requested by the Government in any litigation or proceeding for the recovery of such tax; and Provided further, the Contractor represents that there is included in the prices named herein any taxes described above in (1) and (2) of this paragraph (d) applicable to the employment or use of the facilities or services of a third party by the Contractor in order to perform its obligations hereunder of storing or transporting Government-owned property and the Government shall not be required to reimburse Contractor for any Federal, state or local tax which Contractor might be required to pay to [fol. 770] such third party or to the Federal, state or local Government, as the case may be, by reason of the employment or use of such storage or transportation facilities or services, or on the amounts paid for the employment or use of such storage or transportation facilities or services. Nothing contained in this paragraph (d) shall be construed as requiring the Government to reimburse the Contractor for any Federal, state or local income taxes, income surtaxes or excess profits taxes, or taxes on property.

(e) for the purposes of any additional procurement of supplies or work called for by any agreement supplemental hereto, the words "date of this contract" as used in this Article, shall be deemed to refer to the date of such supplemental agreement.

(f) All applications for tax exemption certificates under

this contract shall be made to the Follow-up Clearance Branch, Procurement Control Section, Procurement Division, Army Air Forces, Materiel Command, Wright Field, Dayton, Ohio, or otherwise as may be directed in writing by the Contracting Officer to the Contractor.

Article 19—Eight-Hour Law—Overtime Compensation.

No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the Contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work at the site thereof, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this Article. The wages of every laborer and mechanic employed by the Contractor or any subcontractor engaged in the performance of this contract shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this Article a penalty of five dollars shall be imposed upon the Contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this Article, and all penalties thus imposed shall be withheld for the use and benefit of the Government: Provided, That this stipulation shall be subject in all respects to the exceptions and provisions of U. S. Code, title 40, sections 321, 324, 325 and 326, relating to hours of labor, as modified by the provisions of Section 303 of Public Act No. 781, 76th Congress, approved September 9, 1940, relating to compensation for overtime.

Article 20—Convict Labor

The Contractor shall not employ any person undergoing sentence of imprisonment at hard labor. This provision shall not be construed to prevent the Contractor or any

subcontractor hereunder from obtaining any of the supplies, or any component parts or ingredients thereof, to be [fol. 771] furnished under this contract or any of the materials or supplies to be used in connection with the performance of this contract, directly or indirectly, from any Federal, State or territorial prison or prison industry, Provided, That such articles, materials or supplies are not produced pursuant to any contract or other arrangement under which prison labor is hired by or employed or used by any private person, firm or corporation.

Article 21—Assignment of Rights Hereunder

(a) The following provisions of this Article shall be deemed inoperative if this contract does not provide for payments aggregating $1,000 or more.

(b) Claims for monies due or to become due the Contractor from the Government under this contract may be assigned to a bank, trust company or other financing institution, including any Federal lending agency. Any such assignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing.

(c) In the event of any such assignment the assignee shall file four signed copies of a written notice of the assignment, together with one copy of the instrument of assignment, with each of the following:

(i) General Accounting Office;

(ii) the Contracting Officer;

(iii) the surety or sureties upon the bond or bonds, if any, in connection with this contract;

(iv) the officer designated in this contract to make payments thereunder;

(d) Any claim under this contract which has been assigned pursuant to the foregoing provisions of this Article may be further assigned and reassigned to a bank, trust company or other financing institution, including any Federal lending agency. In the event of such further assign-

ment or reassignment the assignee shall file one signed copy of a written notice of the further assignment or reassignment together with a true copy of the instrument of further assignment or reassignment with the Contractor; and shall file four signed copies of such written notice and one copy of such instrument with each of the parties designated in the preceding paragraph.

(e) No assignee shall divulge any information concerning the contract except to those persons concerned with the transaction.

(f) Payment to an assignee of any claim under this contract shall not be subject to reduction or set-off for any indebtedness of the assignor to the United States arising independently of this contract.

(g) Indication of the assignment of claim and of any further assignment thereof and the name of the assignee will be made on all vouchers or invoices certified by the Contractor.

[fol. 772] Article 22—Notice to the Government of Labor Disputes

(a) Whenever an actual or potential labor dispute is delaying or threatens to delay the timely performance of this contract, the Contractor will immediately give notice thereof to the nearest Army Air Forces Representative. Such notice shall include all relevant information with respect to such dispute.

(b) The Contractor will include in each subcontract hereafter made under this contract the following provision:

> "Whenever an actual or potential labor dispute is delaying or threatens to delay the timely performance of the contract, ——(subcontractor) will immediately give notice thereof to the nearest Army Air Forces Representative. Such notice shall include all relevant information with respect to such dispute."

As used in this paragraph (b) the term "subcontract" shall have the same definition as that contained in Article 10.

[fol. 773] Article 23—Renegotiation Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as Amended

(a) Upon the written demand of the Secretary, at such period or periods when, in the judgment of the Secretary, the profits accruing to the Contractor under this contract can be determined with reasonable certainty, the contract price will be renegotiated to eliminate therefrom any amount found as a result of such renegotiation to represent excessive profits. The demand of the Secretary shall fix a place for renegotiation and a time for commencement thereof not later than one year after the close of the fiscal year of the Contractor within which completion or termination of this contract, as determined by the Secretary, occurs.

(b) The Contractor will furnish to the Secretary such statements of actual costs of production and such other financial statements, at such times and in such form and detail, as the Secretary may prescribe, and will permit such audits and inspections of its books and records as the Secretary may request.

(c) The Government shall retain from amounts otherwise due the Contractor, or the Contractor shall repay to the Government if paid to him, any amount of the contract price found as a result of such renegotiation to represent excessive profits and not eliminated through reductions in contract price or otherwise, as the Secretary may direct.

(d) The Contractor will include in each subcontract described in paragraph (f) (2) (ii) of this Article and in each subcontract for an amount in excess of $100,000 described in paragraph (f) (2) (i) of this Article, made by the Contractor under this contract, the following provision:

"Article—Renegotiation Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended:

(1) Upon the written demand of the Secretary, at such period or periods when, in the judgment of the Secretary, the profits accruing to ——— (Subcontractor) under this contract can be determined with reasonable certainty, the Secretary and ———

(Subcontractor) will renegotiate the contract price to eliminate therefrom any amount found as a result of such renegotiation to represent excessive profits. The demand of the Secretary shall fix a place for renegotiation and a time for the commencement thereof not later than one year after the close of the fiscal year of the subcontractor within which completion or termination of this contract, as determined by the Secretary, occurs.

(2) ———— (Subcontractor) will furnish to the Secretary such statements of actual costs of production and such other financial statements, at such times and in such form and detail, as the Secretary may prescribe, and will permit such audits and inspections of its books and records as the Secretary may request.

(3) Any amount of the contract price found as a result of such renegotiation to represent excessive profits shall, as directed by the Secretary,—

[fol 774] (A) Be deducted by ———— (Contractor) from payments otherwise due to ———— (Subcontractor) under this contract; or

(B) Be paid by ———— (Subcontractor) directly to the Government, if paid to him; or

(C) Be eliminated through reductions in the contract price or otherwise.

(4) ———— (Subcontractor) agrees that ———— (Contractor) shall not be liable to ———— (Subcontractor) for or on account of any amount paid to the Government by ———— (Subcontractor) or deducted by ———— (Contractor) from payments otherwise due under this contract, pursuant to directions from the Secretary in accordance with the provisions of this Article. Under its contract with the Government, ———— (Contractor) is obligated to pay or credit to the Government all amounts withheld by it from ———— (Subcontractor) hereunder.

(5) ———— (Subcontract) agrees (a) upon direction of the Secretary, to include in any subcontract hereunder sections (1) to (6) inclusive of this Article, and (b) to make no subdivisions of any contract or subcontract for the purpose of evading the provisions of

this section, and (c) to repay to the Government the amount of any reduction in the contract price of any such subcontract which results from renegotiation thereof by the Secretary, and which the Secretary directs ——— (Subcontractor) to withhold from payments otherwise due under such subcontract and actually unpaid at the time ——— (Subcontractor) receives such direction.

(6) As used in this Article,—

(a) The term 'Secretary' means the Secretary of War or any duly authorized representative of the Secretary, including the Contracting Officer.

(b) The term 'subcontract' means any purchase order, agreement or arrangement within the definition set forth in Section 403 (a) (5) of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, and not exempt under or exempted pursuant to that Act.

(c) The terms 'renegotiate' and 'renegotiation' have the same meaning as in section 403 (b) of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended.

[fol. 775] (d) The term 'this contract' means this contract as modified from time to time."

(e) (1) The Contractor agrees to make no subdivisions of any contract or subcontract for the purpose of evading the provisions of this Article.

(2) If any renegotiation between the Secretary and any subcontractor pursuant to the provisions required by section (d) hereof results in a reduction of the contract price or fixed-fee of the subcontract, the Government shall retain from payments otherwise due to the Contractor, or the Contractor shall repay to the Government, as the Secretary may direct, the amount of such reduction which the Secretary directs the Contractor to withhold from payments otherwise due to the subcontractor under the subcontract and actually unpaid at the time the Contractor receives such direction.

(f) As used in this Article:

(1) The term "Secretary" means the Secretary of War or any duly authorized representative of the Secretary, including the Contracting Officer.

(2) The term "subcontract" means (i) any purchase order or agreement to perform all or any part of the work or to make or furnish any material, part, assembly, machinery, equipment or other personal property, required for the performance of this contract, or (ii) any contract or arrangement (other than a contract or arrangement between two contracting parties one of which parties is found by the Secretary to be a bona fide executive officer, partner, or full-time employee of the other contracting party), (A) any amount payable under which is contingent upon the procurement of a contract or contracts with a Department or of a subcontract or subcontracts thereunder, or determined with reference to the amount of such a contract or subcontract or such contracts or subcontracts, or (B) under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a Department or a subcontract or subcontracts thereunder, unless exempt under or exempted pursuant to Section 403 (i) of the Sixth Supplemental National Defense Appropriation Act of 1942, as amended.

(3) The terms "renegotiate" and "renegotiation" have the same meaning as in section 403 (b) of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended.

(4) The term "this contract" means this contract as modified from time to time.

(g) If the contractor makes any subcontract under this contract upon a fixed-fee basis, (i) for determining the application of section (d) the amount of said subcontract shall be deemed to be the estimated cost thereof plus the fixed-fee and (ii) there shall be substituted in paragraphs (1) and (3) of the Article to be inserted therein pursuant to section (d) the words "fixed-fee specified in Article _____" for the words "contract price".

[fol. 77] Article 24—Approval—This Contract shall be

subject to the written approval of the Secretary of War or such individual as said Secretary may designate, and shall not be binding until so approved. The date of said approval shall be deemed to be the true date for the purpose of determining all times of performance.

[fol. 777] 1. The Contractor shall perform services in receiving, transporting, storing, handling, and delivering of not to exceed Thirty-four Million Twenty-nine Thousand (34,029,000) gallons of Government-owned aircraft engine fuel in the amounts and at the places and for the prices applicable to the elective types of delivery which may be directed under the terms hereof. The types of fuel covered by this contract will hereafter be referred to as either Type "A" or Type "B".

Type "A", whenever used hereinafter, shall refer to Grade 130 aircraft engine fuel in accordance with Army-Navy Specification AN-F-28 dated 23 December 1942 and Amendment No. 2 dated 2 October 1943, and/or Grade 98/130 in accordance with Army-Navy Specification AN-F-27 dated 10 July 1943.

Type "B", whenever used hereinafter, shall refer to Grade 91 aircraft engine fuel in accordance with Army-Navy Aeronautical Specification AN-F-26 dated 15 April 1943.

The types of delivery which may be directed under the terms hereof shall be designated as Type "I", "II" or "III".

Type I, whenever used hereinafter, shall refer to delivery f.o.b. Government storage at destination, in Contractor's Transport Trucks and/or Commercial Transport Trucks, arranged for by Contractor.

Type II whenever used hereinafter shall refer to delivery f.o.b. Commercial Transport Trucks, or Government and/or Commercial Tank Cars at the terminal or bulk plant of the Contractor at Memphis, Tennessee. Contractor to arrange for use of Truck Transports and Commercial Tank Cars when Government cars are not available.

Type III whenever used hereinafter shall refer to delivery f.o.b. the bulk plant or terminal of the Contractor at Memphis, Tennessee, into Government Servicing Units or such other Trucking equipment as may be designated by the Government.

2. The services set forth above shall be performed when and as, during the period beginning 1 December 1943 and extending through 30 June 1944, the Government shall request and direct the Contractor to supply the same, in the grades, at the places, in the amounts and for the prices shown on the attached Exhibit "A-1".

3. It is understood and agreed by and between the parties that any rubber hose used by Contractor on any trucks or facilities employed in the performance of services called for under the terms of this contract shall be of a type resistant to aromatics in concentrations of up to forty per cent (40%).

[fol. 778] 4. As of the date of execution of this contract, there has been allocated for it the total sum of not to exceed Five Hundred Thirty-three Thousand Nine Hundred Ninety-three Dollars and Seventy Cents ($533,993.70). This sum may be increased from time to time by the Government solely in its discretion. Upon the making of any such increase, the Contracting Officer shall notify the Contractor in writing of the amount of such increase. Anything in this contract to the contrary, notwithstanding, the Government shall not be obligated to pay to the Contractor any amount in excess of said sum allotted for this contract provided, that, if the Contractor performs services of the type called for in this contract, for which funds are not allotted, the Contracting Officer may ratify such services when funds are allotted therefor.

[fol. 779]

EXHIBIT "A-1" TO CONTRACT W 33-038 AC-1683 (11557)

Item No.	Grade	Quantity	Destination	Elective Types of Delivery	Price per gallon
1.	A	1,907,000	Memphis Municipal Airport, Memphis, Tennessee	I	$0.0105
				II, or III	$0.0069
	B	4,742,000	"	I	$0.0066
				II, or III	$0.0030
Item No.					
2	A	432,000	Adams Field, Little Rock, Arkansas	I	$0.0267
				II, or III	$0.0069
	B	95,000	"	I	$0.0228
				II, or III	$0.0030

EXHIBIT "A-1"—Continued

Item No.					
3	A	108,000	Blytheville Army Air Field, Blytheville, Arkansas	I	$0.0184
				II, or III	$0.0069
	B	5,018,000	"	I	$0.0145
				II, or III	$0.0030
Item No.					
4	A	93,000	Newport Army Air Field Newport, Arkansas	I	$0.025
				II, or III	$0.0069
	B	103,000	"	I	$0.0211
				II, or III	$0.0030
Item No.					
5	A	50,000	Stuttgart Army Air Field Stuttgart, Arkansas	I	$0.0242
				II, or III	$0.0069
	B	3,956,000	"	I	$0.0203
				II, or III	$0.0030

[fol. 780]

Item No.					
6	A	1,183,000	Northern Field, Tullahoma, Tennessee	I	$0.0375
				II, or III	$0.0069
Item No.					
7	A	4,687,000	Smyrna Army Air Field Smyrna, Tennessee	I	$0.0375
				II, or III	$0.0030
Item No.					
8	A	1,568,000	Berry Field, Nashville, Tennessee	I	$0.0362
				II, or III	$0.0069
Item No.					
9	A	90,000	Dyersburg Army Air Field, Dyersburg, Tennessee	I	$0.0154
				II, or III	$0.0069
Item No.					
10	B	10,000,000	Memphis Terminal, Memphis, Tennessee	II, or III	$0.0030
			Total price of Items 1 to 10 inclusive not to exceed		$533,993.70

[fol. 781] EXHIBIT "B"
ac-1683

CERTIFICATE
AIRCRAFT ENGINE FUEL

ORIGINAL
(Duplicate, triplicate, etc., as per instructions in Article 3).

—— (Shipper's Certificate Number)

The Undersigned Company hereby certifies that the shipment of Fuel, Aircraft Engine, Specification No. —, Amend. No. — Grade No. —.

To Consignee —— Location ——.

From (Shipping Point) ——— On (AAF Contract or Order No.) ———.

On (Date Shipped) ——— In (Type of Container ——— ——, is identified in detail as follows

Identifying Numbers of Containers	Serial Numbers of Seals (If Applicable)	Bill of Lading No.	Quantity Gal. at 60° F.

The Undersigned Company further certifies that the aircraft engine fuel delivered, as described above, was taken from a stock composed only of material received in properly sealed and inspected tank cars or other type vessels; also that each shipping container described above was thoroughly inspected, and cleaned, if necessary, and approved for use in shipping aircraft engine fuel.

_____
(Name of Company)

Approved _____
(Army Air Forces Inspector)
Or

_____
(Authorized Signature)

Subscribed and sworn to before me this — day of ———

_____
(Notary Public)

(Seal)

From Tank ——— Date———.

[fol. 782] In witness whereof, the parties hereto have executed this contract as of the day and year first above written.

Note: Type or print names under all signatures

The United States of America, by (S.) Dean Sweeney, 1st Lt., Air Corps, Contracting Officer. Standard Oil Company of Louisiana, Contractor, by (S.) Weir R. Goodwin, Director, Baton Rouge, Louisiana.

Two Witnesses: Attest (S.) W. F. Quick, Asst. Sec'y; (S.) M. G. Piddington.

I, W. F. Quick, certify that I am the Ass't. Secretary of the corporation named as Contractor herein; that Weir R. Goodwin who signed this contract on behalf of the Contractor, was then Director of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

(S.) W. F. Quick, Asst. Secretary. (Corporate Seal.)

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, —— —— who signed this contract for the Standard Oil Company, had authority to execute the same, and is the individual who signs similar contracts on behalf of this corporation with the public generally.

—— ——, (Contracting Officer).

[fol. 783] Supplemental Agreement No. 1 (S-4340) to Contract W33-038 ac 1683 (11557)

ANNB Preference None

Classification 06-A, 12

AFP 985981A
I. O. M. ——

Supplemental Agreement to Fixed Price Contract GRC:mls for Services

(Army Air Forces)

War Department

Contractor: Standard Oil Company of Louisiana.

Supplemental Agreement for Storage, Handling, Receiving and Transporting of Aircraft Engine Fuel.

Change in Price: Increase—not to exceed $93,252.90.

Payments to be made by the Finance Officer, United States Army, Mutual Home Building, 120 West Second Street, Dayton, Ohio.

The supplies and services, if any, to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the allotments below enumerated under the heading "Debit", the available balances of which are sufficient to cover the cost thereof. The reduction, if any, in price under this instrument will result in credits to the allotments below enumerated under the heading "Credit".

Debit 2-4006 P 423-07 A 212/40705

9/23/43

[fol. 784] Supplemental Agreement to Fixed Price Contract for Services

This Supplemental Agreement No. 1 (S-4340) to Contract W 33-038 ac-1683, entered into this 12th day of June, 1944, by and between The United States of America, hereinafter called the "Government", represented by the Contracting

Officer executing this Supplemental Agreement,* and Standard Oil Company of Louisiana, a corporation organized and existing under the laws of the State of Louisiana, of the City of New York, in the State of New York, hereinafter called the "Contractor",

Witnesseth

Whereas, the Government and the Contractor have heretofore entered into Contract W 33-038 ac-1683, which contract is hereinafter called the "Service Contract", pursuant to which the Contractor has agreed to the storage, handling, receiving, transporting and delivery of Aircraft Engine Fuel, at a total price of not to exceed $533,993.70.

Now, therefore, in consideration of the premises and of the mutual covenants and agreements herein contained and for other good and valuable considerations, the parties hereto agree as follows:

First: Exhibits "A" and "A-1" to said contract are hereby deleted and the following Exhibits "A" and "A-1" substituted in lieu thereof:

"Exhibit 'A' to Contract W 33-038 ac-1683 (11557)

1. The Contractor shall perform the services in receiving, transporting, storing, handling and delivering of approximately 34,029,000 gallons of Government-owned aircraft engine fuel, Grades 130 and 91, in the approximate amounts and at the places and for the prices applicable to the elective types of delivery which may be directed under the terms hereof.

2. The Contractor shall transport said Government-owned aircraft engine fuel via Contractor-owned or controlled barges from Contractor's Baton Rouge, Louisiana, refinery to Contractor's Memphis, Tennessee, Terminal at a price of $0.0039 per gallon for Grade 130 fuel and at a price of $0.0045 per gallon for Grade 91 fuel. Thereafter said fuel shall be delivered as directed by the Contracting Officer in accordance with

* This Supplemental Agreement was negotiated under the authority of the First War Powers Act, 1941, and Executive Order No. 9001, December 27, 1941.

certain 'types' of delivery hereinafter described and designated as types 'I', 'II', or 'III'. The price per gallon for each type of delivery as indicated on Exhibit 'A-1' attached hereto includes the aforesaid charges of $0.0039 per gallon in the case of Grade 130 fuel and $0.0045 per gallon in the case of Grade 91 fuel for the transportation of the same by barges as above provided.

[fol. 785] 3. Type I whenever used hereafter shall refer to delivery f.o.b. Government storage at destination in Contractor's transport trucks and/or commercial transport trucks arranged for by Contractor.

4. Type II whenever used hereinafter shall refer to delivery f.o.b. commercial transport trucks, or Government and/or commercial tank cars at the terminal or bulk plant of the Contractor at Memphis, Tennessee, Contractor to arrange for use of truck transports and commercial tank cars when Government cars are not available.

5. Type III whenever used hereinafter shall refer to delivery f.o.b. the bulk plant or terminal of the Contractor at Memphis, Tennessee, into Government servicing units or such other trucking equipment as may be designated by the Government.

6. It is understood and agreed by and between the parties that any rubber hose used by Contractor on any trucks or facilities employed in the performance of services called for under the terms of this contract shall be of a type resistant to aromatics in concentrations of up to forty per cent (40%).

7. The services of the types set forth above and at the points and for the unit prices indicated in Exhibit 'A-1', shall be performed when and as, during the period beginning 1 December 1943, and extending through 30 June 1944, the Government shall request and direct the Contractor to supply the same, provided, however, in the event that Contractor receives any of the fuel specified herein at its Memphis, Tennessee, Terminal by Government-paid transportation, the sum of $0.0039 per gallon in the case of Grade 130 fuel or the sum of $0.0045 per gallon in the case of Grade 91 fuel shall be deducted from the prices set forth in said

Exhibit 'A-1' which is applicable to the type of delivery accomplished by the Contractor, and Contractor's invoices submitted hereunder shall indicate thereon the reason for such deductions as herein stated.

8. As of the date of execution of this Supplemental Agreement there has been allocated for this contract the total sum of not to exceed Six Hundred Twenty-seven Thousand Two Hundred Forty-six Dollars and Sixty Cents ($627,246.00). The Contractor shall be required to perform services in handling quantities of fuel in excess of the quantity set forth in paragraph 1 of this Exhibit 'A', provided that the performance of such services at the applicable prices will not entitle the Contractor to payments in excess of the total sum allotted to this contract. The sum allocated to the contract may be increased from time to time by the Government solely in its discretion. Upon the making of any such increase the Contracting Officer shall notify the Contractor in writing of the amount of such increase. Anything in this contract to the contrary notwithstanding the Government shall not be obligated to pay to the Contractor any amount in excess of said sum allotted to this contract provided that if Contractor performs services of the type called for in this contract for which funds are not allotted the Contracting Officer may ratify such services when funds are allotted therefor."

"EXHIBIT 'A-1' TO CONTRACT W 33-038
ac-1683 (11557)

Item No.	Grade	Quantity in Gallons	Destination	Elective Types of Delivery	Price per Gallon
1	130	1,907,000	Memphis Municipal Airport Memphis, Tennessee	I	$0.0105
				II or III	0.0069
	91	4,742,000	Memphis Municipal Airport Memphis, Tennessee	I	0.0111
				II or III	0.0075
2	130	432,000	Adams Field Little Rock, Arkansas	I	0.0267
				II or III	0.0069
	91	95,000	Adams Field Little Rock, Arkansas	I	0.0273
				II or III	0.0075
3	130	108,000	Blythesville Army Air Field Blythesville, Arkansas	I	0.0184
				II or III	0.0069
	91	5,018,000	Blythesville Army Air Field Blythesville, Arkansas	I	0.0190
				II or III	0.0075
4	130	93,000	Newport Army Air Field Newport, Arkansas	I	0.025
				II or III	0.0069
	91	100,000	Newport Army Air Field Newport, Arkansas	I	0.0256
				II or III	0.0075
5	130	50,000	Stuttgart Army Air Field Stuttgart, Arkansas	I	0.1242
				II or III	0.0069
	91	3,956,000	Stuttgart Army Air Field Stuttgart, Arkansas	I	0.0248
				II or III	0.0075
6	130	1,183,000	Northern Field Tullahoma, Tennessee	I	0.0375
				II or III	0.0069
	91		Northern Field Tullahoma, Tennessee	I	0.0381
				II or III	0.0075
7	130	4,687,000	Smyrna Army Air Field Smyrna, Tennessee	I	0.0375
				II or III	0.0069
	91		Smyrna Army Air Field Smyrna, Tennessee	I	0.0381
				II or III	0.0075

[fol. 787]

8	130	1,568,000	Berry Field Nashville, Tennessee	I	0.0362
				II or III	0.0069
	91		Berry Field Nashville, Tennessee	I	0.0368
				II or III	0.0075
9	130	90,000	Dyersburg Army Air Field Dyersburg, Tennessee	I	0.0154
				II or III	0.0069
	91		Dyersburg Army Air Field Dyersburg, Tennessee	I	0.0160
				II or III	0.0075

[fol. 789] COMPLAINANT'S EXHIBIT No. 2

UNITED STATES OF AMERICA

Department of the Air Force

Dayton, Ohio 24 March 1950

I hereby certify that the attached document is a true copy of a copy of Contract No. W 33-038 ac-1863 on file in the Air Materiel Command Contract Research and Development Depository, Base Adjutant's Office, Wright-Patterson Air Force Base, Dayton, Ohio. I further certify that said document is part of the official files of the United States Air Force.

Hugh J. White, Captain, USAF.

I hereby certify that Hugh J. White, Captain, USAF, who signed the foregoing certificate, is the Assistant Adjutant and Base Records Officer, Wright-Patterson Air Force Base, Dayton, Ohio, and that to his certification as such full faith and credit are and ought to be given.

In testimony whereof, I, W. Stuart Symington, Secretary of the Air Force, have hereunto caused the seal of the Department of the Air Force to be affixed and my name to be subscribed by the Administrative Assistant to the Secretary of the Department, at the City of Washington, this 30th day of March, 1950.

W. Stuart Symington, Secretary of the Air Force, by Ernest Krom, Deputy Administrative Assistant.
(Seal.)

"Exhibit 'A-1' to Contract W 33-038
ac-1683 (11557)

Item No.	Grade	Quantity in Gallons	Destination	Elective Types of Delivery	Price per Gallon
10	130	10,000,000	Memphis Terminal Memphis, Tennessee	II or III	0.0069
	91		Memphis Terminal Memphis, Tennessee	II or III	0.0075

Total price of Items 1 to 10, inclusive, not to exceed . . . . $627,246.60."

Second: Except as hereby modified, either expressly or by necessary implication, all the terms, covenants and conditions of the Supplies Contract shall continue in full force and effect.

Page 3 of Supplemental Agreement No. 1 to Contract W 33-038 ac-1683.
Page 4 of Supplemental Agreement No. 1 to Contract W 33-038 ac-1683.

[fol. 788] In witness whereof, the parties hereto have executed this Supplemental Agreement as of the day and year first above written.

The United States of America by (S.) Dean Sweeney, Air Corps Captain, Contracting Officer (Official Title). Standard Oil Company of Louisiana (Contractor) by (S.) Weir R. Goodwin, Director, Baton Rouge, Louisiana (Business Address).

Attest: (S.) W. F. Quick, Assistant Secretary.

Note: Type or print names under all signatures.

I, W. F. Quick, certify that I am the Asst. Secretary of the corporation named as Contractor herein; that Weir R. Goodwin who signed this Supplemental Agreement on behalf of the Contractor, was then Director of said corporation; that said Supplemental Agreement was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

(S.) W. F. Quick. (Corporate Seal.)

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, ——— ———, who signed this Supplemental Agreement for the Standard Oil Company of Louisiana, had authority to execute the same, and is the individual who signs similar agreements on behalf of this corporation with the public generally.

——— ———, Contracting Officer.

[fol. 790] Contract No. W 33-038 ac-1863 (11741)

AFP: 545010A; 40668A

Class: 12;06A

Fixed Price Service Contract

(Army Air Forces)

War Department

WLB:ch

Contractor: Standard Oil Company of Louisiana

Contract For: Storage and Handling of Government-owned Aircraft Engine Fuel.

Amount: Not to Exceed $38,078.66

Place: AAF, Materiel Command, Wright Field, Dayton, Ohio.

Payments to be made by the Finance Officer, U. S. Army, Mutual Home Building, 120 West Second Street, Dayton, Ohio.

The services and/or supplies to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to allotments below enumerated, the available balances of which are sufficient to cover the cost thereof.

	2-4006 P 423-07 A 212/40705	$35,675.00
ACA 1942-44,	2-4006 P 412-07 A 212/40705	2,403.66

[fol. 791] Fixed Price Service Contract

(Army Air Forces)

War Department

This Contract, entered into this 22nd day of June, 1944, by and between The United States of America, hereinafter called the "Government", represented by the Contracting Officer executing this contract,* and Standard Oil Company

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* This contract was negotiated under the authority of the first War Powers Act, 1941, and Executive Order No. 9001, December 27, 1941.

of Louisiana, a corporation organized and existing under the laws of the State of Louisiana, having its principal place of business in the City of New York, in the State of New York, hereinafter called the "Contractor",

Witnesseth

Whereas, in the prosecution of its war effort, the Government deems it necessary to contract with various individuals, firms, associations, or corporations, for the storage, handling and delivering of aviation fuel and the rendering of miscellaneous services in connection therewith at strategically situated locations throughout the United States, and

Whereas, it has been administratively determined that established facilities of the Government are inadequate to provide these essential services and therefore, the execution of such agreements will promote the interests of the Government, and

Whereas, the Contractor represents that it is the owner of, and/or can provide storage and handling facilities adequate for the storage, handling and delivering of Government-owned aviation fuel under this contract, and possesses the means and ability to perform other necessary services in connection therewith;

Now, therefore, in consideration of the premises and of the mutual covenants and agreements herein contained and for other good and valuable considerations, the parties hereto agree as follows:

Article 1—Scope of this Contract

(a) The Contractor shall furnish and supply to the Government storage and handling facilities in the capacities, at the points, and for the prices indicated in Exhibit "A", which is hereto attached and hereby made a part hereof and shall render services in connection therewith, as hereinafter more particularly described, in receiving, storing, handling, loading, shipping and delivering Government-owned fuel (the word "fuel" as used hereinafter shall mean Government-owned fuel unless otherwise specified), as indicated in said Exhibit "A", and shall render such further services as are called for in said Exhibit "A". Said services shall

be performed when and as, during the period or periods indicated in said Exhibit "A", the Government shall request and direct the Contractor to supply the same. Said services shall be performed by the Contractor in accordance with the following stipulations and conditions:

[fol. 792] (1) To order stocks of fuel to be shipped to Contractor's storage facilities as may be directed by the Contracting Officer.

(2) To receive such stocks of fuel into such storage facilities, and store the same as may be directed by the Contracting Officer.

(3) To load, ship and deliver such stocks of fuel from such storage facilities as may be directed by the Contracting Officer.

(4) To keep a complete and adequate record of and, if necessary, to trace and expedite all shipments on orders placed and on loadings, shipments and deliveries made by the Contractor as directed under the terms hereof.

(5) To render reports as of the close of business daily, by telegraph or telephone, at the expense of the Government, giving the following information pertaining to each terminal (storage from which shipments are regularly made to more than one point):

(a) Total number of gallons of each grade of fuel shipped during the preceding twenty-four (24) hours.

(b) Tank car numbers by grade to each destination, except shipments to Naval Air Stations.

(c) Barge numbers or names by grade and quantity to each destination, except shipments to Naval Air Stations.

(d) Quantity, grade and manner of shipments during the preceding twenty-four (24) hours to Naval Air Stations at the following locations:

1. Alabama: Mobile.

2. Florida: Pensacola, Panama City, Tampa, Port Everglades, Jacksonville, and Miami.

3. Georgia: Savannah.

4. North Carolina: Wilmington.

(e) Balances of each grade of fuel on hand at the close of the twenty-four (24) hours covered by the report.

(6) To render reports in duplicate by mail (air mail if normal mailing time is over twenty-four (24) hours) covering in detail receipts, shipments and losses or gains for the following periods of each month: First to eighth, inclusive; ninth to fifteenth, inclusive; sixteenth to twenty-third, inclusive, and twenty-fourth to the last day thereof, inclusive. This quarter-monthly report shall contain all the information provided for in and shall be prepared as an affidavit on "Government [fol. 793] Owned Stock Report", Air Service Command Form No. 2013. Upon request of the Contractor directed to the Property Officer, Fuels Distribution Branch, Headquarters, Air Service Command, Patterson Field, Ohio, blank forms No. 2013 will be made available to the Contractor.

(7) In the event Contractor is required under the terms hereof to make delivery of fuel into aircraft, Contractor shall provide the reporting authority designated by the Commanding General, Air Service Command, and located at the destination where such delivery is accomplished, with such information as said reporting authority may require in order to enable it to comply with the current issue of Air Service Command Regulation 15-72 dated June 14, 1943.

(8) To render any additional reports in such other form or fashion as may be directed in writing by the Property Officer, Fuels Distribution Branch, Headquarters, Air Service Command, Patterson Field, Ohio, relating to the reporting of stock balances, receipts, loadings, shipments, deliveries and stock losses or gains.

(9) To provide and maintain adequate equipment and personnel sufficient for proper storage and efficient handling of all shipments received and loadings, shipments and deliveries made which may be called for under the terms hereof and to accomplish all such services in accordance with the best standard commercial practices.

(b) Contractor shall make necessary preparations or alterations in the loading and unloading facilities at its storage point or points in order to perform efficiently the services rendered hereunder in accordance with standard commercial practice, and shall clean and/or condition or recondition said facilities to make them suitable for the handling of aviation fuel.

(c) The Contractor shall exercise due diligence in placing such orders and making such deliveries as may be directed under the terms of paragraph (a) hereof and shall accomplish the receipt and delivery of such stocks of fuel within a reasonable time after receipt of instructions from the Contracting Officer therefor. Contractor shall have the responsibility of maintaining stocks of fuel in its storage facilities sufficient to meet through-put requirements, provided that the fuel is available and allocated at the refineries or sources thereof and provided transportation facilities are adequate.

(d) Contractor shall provide a responsible source of contact twenty-four hours a day, seven days a week, at or near the storage facilities referred to in Exhibit "A" for the purpose of receiving such instructions as may be issued under the terms of this contract and the Contractor shall immediately, upon execution of the contract, provide the Property Officer, Fuels Distribution Branch, Headquarters, Air Service Command, Patterson Field, Ohio, with the name [fol. 794] or names, addresses and telephone numbers of the respective responsible parties assigned to such storage facilities.

(e) Contractor shall be responsible to the extent provided in Article 14 hereof, until delivery thereof has been accomplished, for the total gallonage received at its storage facilities on the basis of volume, determined as hereinafter set forth, corrected to 60° F.:

(1) Receipts made from tank wagon or tank truck (of under 3,500 gallons capacity): On an actual volume basis, without temperature correction.

(2) Receipts made from tank car or tank truck (of 3,500 gallons capacity or more): On a volume basis corrected to 60° F.

Provided that if any such conveyance referred to in (1) or (2) shows, after proper gauging, a volume, corrected to 60° F. when required hereunder, in excess of one per cent (1%) less than the volume, similarly corrected, shipped as the same appears on the bill of lading or equivalent shipping document, the Contractor shall, jointly with the local freight agent or truck operator, and the AAF Inspector in Charge, if available, determine the actual shortage or loss, and the Contractor shall notify the Property Officer, Fuels Distribution Branch, Headquarters, Air Service Command, Patterson Field, Ohio, by telegram of the amount of shortage, and the reason therefor, if known. In case of any such shortage the Contractor shall sign the bill of lading or equivalent shipping document for the actual quantity received and not for the quantity shipped. As used in (1) and (2) hereof the words "volume basis" mean volume measured by guage, if any, on said conveyance and if none, then by gauge on Contractor's receiving facilities.

(3) Receipts made from tanker, barge or other vessel: On a volume basis corrected to 60° F.

Provided that such vessel and the receiving shore tanks shall be gauged jointly by the Contractor, the master of the vessel and the AAF Inspector in Charge, if available, before the unloading of the vessel and again after such unloading; in the event that the volume, corrected to 60° F., received by the Contractor is in excess of one per cent (1%) less than the volume, corrected to 60° F., shipped in such vessel as appears on the applicable shipping document, the actual shortage or loss shall be determined by the aforementioned parties and the Contractor shall notify the Property Officer, Fuels Distribution Branch, Headquarters, Air Service Command, Patterson Field, Ohio, by telephone of the amount of such shortage and the reason therefor, if known. In case of such shortage, the Contractor shall sign the Marine bill of lading or applicable shipping document for the actual quantity received and not for the quantity shipped.

[fol. 795] (f) Contractor shall be allowed not to exceed one per cent (1%) for any loss of volume in fuel for each through-put at its storage facilities and the amounts of such losses shall be indicated on the quarter-monthly reports called for under paragraph (a) (6) hereof.

(g) In the event Contractor violates any instructions as to delivery of fuel out of its storage facilities, either as to method, date, quantity, destination or grade, or otherwise, which may be specified under the terms hereof, the transportation costs involved in such unauthorized delivery shall be deducted from amounts otherwise due the Contractor hereunder.

(h) The parties agree that the services described herein, if any, heretofore performed by the Contractor, at the request of the Government, were in contemplation of and are subject to the provisions of this contract, the same as though performed by the Contractor after the date of execution hereof.

(i) All reports called for under the terms of this Article shall be made to the Property Officer, Fuels Distribution Branch, Headquarters, Air Service Command, Patterson Field, Ohio, or to such other reporting authority as may be designated in writing by said Property Officer, Air Service Command.

Article 2—Consideration

The Government will pay to the Contractor, upon satisfactory performance of the services herein specified, the prices set forth in Exhibit "A", during the period specified therein or any extension or renewal thereof, if such extension or renewal is provided for elsewhere in this contract. For payment purposes the gallonage handled by Contractor through its storage facilities shall be determined as follows:

(1) Upon loadings made into tank wagon or tank truck (under 3,500 gallons capacity): On an actual volume basis without temperature correction.

(2) Upon bulk loadings by any other means (3,500 gallons capacity or more): On a volume basis corrected to 60° F.

(3) As used in (1) and (2), the words "volume basis" mean volume measured by gauge, if any, on said

conveyance or vessel and if not, then by gauge on Contractor's delivering facilities.

[fol. 796] Article 3—Inspection and Acceptance for Payment for Loadings Into Transportation Equipment or Deliveries Into Storage

(a) The points of inspection and acceptance for payment by the Government for the services called for hereunder shall be the respective points at which such services are completed. Inspection as referred to herein shall be certificate inspection.

(b) Payment will be made by the Government upon receipt of the following:

(1) Invoices properly prepared and certified. Invoices shall be prepared in quadruplicate and addressed to the Finance Officer at the location designated on the over page hereof. Such invoice shall be serially numbered and dated, and shall include the contract number, the grade and specification number of the material, consignee, shipping containers (tank trucks, tank cars, etc.), date of shipment, bill of lading number, where applicable, gallonage of material computed as specified herein, and the unit prices therefor. The original and first copy of each invoice shall be mailed direct to said Finance Officer. The triplicate and quadruplicate copies shall be mailed direct to the Accountable Officer designated in Article 8 hereof. The Accountable Officer will prepare necessary certificates for services and will forward such papers with the triplicate copy of the invoice to said Finance Officer for payment.

(2) Reports rendered in duplicate by first-class mail, four (4) times per month as specified elsewhere in this contract. These reports shall be dispatched with and to the same addresses as the triplicate and quadruplicate copies of the invoices in subparagraph 1 above.

(3) Certificates in duplicate containing all the information provided for in the form specified in Exhibit "B", which is hereto attached and hereby made a part hereof. These certificates shall be prepared on letter

sized paper 8" x 10½", and shall be distributed on the same date upon which containers are loaded and/or released as follows:

[fol. 797] Original copy to:

Consignee, properly addressed and forwarded immediately upon the loading of the conveyances. In case of tanker or barge shipment such certificates shall be given to the captain or master of the vessel. In the case of tank car shipment the certificate shall be placed in a sealed envelope and sent by first-class mail. In case of truck shipment such certificate shall be placed in a sealed envelope and entrusted to the driver of such truck.

Duplicate copy to:

AAF Inspector (Fuel and Oil) if such inspector is assigned to Contractor's facilities. If no inspector is so assigned the certificate shall be mailed to the Commanding General, Materiel Command, Wright Field, Dayton, Ohio, Attention: Fuels, Lubricants and Chemicals Branch, Inspection Division.

A

[fol. 798] EXHIBIT "A" TO CONTRACT W 33-038 AC-1863

1. The Contractor shall provide storage facilities in the capacity, at the location, during the period and at the monthly use prices indicated below:

Item No.	Tank (Type)	Capacity	Location	Period	Monthly Use Price
1.	Storage	10,000 bbls.	Lion Oil Refining Company, Memphis, Tennessee	On or about January 9, 1944 through June 30, 1944	
2.	Storage	10,000 bbls.	Lion Oil Refining Company, Memphis, Tennessee	On or about January 9, 1944 through June 30, 1944	$450.00
3.	Storage	10,000 bbls.	Lion Oil Refining Company, Memphis, Tennessee	On or about January 9, 1944 through June 30, 1944	

The monthly use price above stated shall be prorated for any periods of time less than a full month.

2. Contractor shall perform services as outlined in Article 1 hereof in handling not to exceed 18,000,000 gallons of Government-owned Aircraft Engine Fuel into and out of the storage facilities listed in said Article 1, by unloading such fuel from barge or tank car into storage and loading such fuel out from storage into tank car, or tank truck, during the period above set forth, at a thru-put charge of $0.0018 per gallon for all handling services (in addition to the monthly use prices stated in paragraph 1 above) and at a total thru-put charge of not to exceed $32,400.00.

3. It is understood and agreed by and between the parties that the storage tanks to be used under this contract are not the property of the Contractor, but are the property of the Lion Oil Refining Company, Memphis, Tennessee. Contractor hereby warrants that it has received from the Lion Oil Refining Company, a legal right to the use of such tanks for the purposes of this contract, during the period of this contract, including all rights of ingress, egress, and maintenance of the storage facilities which may be necessary under this contract, all at no expense to or obligation of the Government other than the Government's obligations to Contractor under the terms of this contract.

4. Contractor covenants that it will cause Lion Oil Refining Company to make such alterations and preparations in such storage tanks and loading and unloading facilities used in connection therewith as is necessary to enable Contractor to carry out its obligations hereunder. The parties [fol. 799] agree that the Government shall reimburse the Contractor in the sum which Contractor is required to pay to Lion Oil Refining Company for the preparation of such storage tanks and for the use, during the period of this contract, of the alterations therein made, but in no event shall said sum exceed $2,903.66, and the same shall be entered on vouchers or invoices as a separate item.

5. It is understood and agreed by and between the parties that any rubber hose used by Contractor on any trucks or facilities employed in the performance of services called

for under the terms of this contract shall be of a type resistant of aromatics in concentrations of up to 40%.

6. As of the date of execution of this contract there has been allotted for the contract the total sum of $38,078.66. As soon as the Contractor has determined that the services which it has performed, or is about to perform pursuant to this contract would entitled the Contractor to payments aggregating $38,078.66, the Contractor shall give notice of such determination to the Contracting Officer and thereupon the Contractor shall not be required to perform other services, which, if performed, would entitle the Contractor to payments in excess of $38,078.66. Said sum, however, may be increased from time to time by the Government solely in its discretion. Upon the making of any such increase the Contracting Officer shall notify the Contractor in writing of the amount of such increase. Anything in this contract to the contrary notwithstanding, the Government shall not be obligated to pay to the Contractor any amount in excess of said sum allotted for this contract, provided, however, that if the Contractor performs services of the types called for in this contract for which funds are not allotted, the Contracting Officer may ratify such services when funds are allotted therefor.

[fols. 800-801] COMPLAINANT'S EXHIBIT No. 3

UNITED STATES OF AMERICA

Department of the Air Force

Dayton, Ohio, 24 March 1950.

I hereby certify that the attached documents are true copies of copies of Contract No. W 33-038 ac-1669 and Change Order No. 1 thereto on file in the Air Materiel Command Contract Research and Development Depositary, Base Adjutant's Office, Wright-Patterson Air Force Base, Dayton, Ohio. I further certify that said documents are part of the official files of the United States of America.

Hugh J. White, Captain, USAF.

I hereby certify that Hugh J. White, Captain, USAF, who signed the foregoing certificate, is the Assistant Adju-

tant and Base Records Officer, Wright-Patterson Air Force Base, Dayton, Ohio, and that to his certification as such full faith and credit are and ought to be given.

In testimony whereof I, W. Stuart Symington, Secretary of the Air Force, have hereunto caused the seal of the Department of the Air Force to be affixed and my name to be subscribed by the Administrative Assistant to the Secretary of the Department, at the City of Washington, this 30th day of March, 1950.

W. Stuart Symington, Secretary of the Air Force, by Ernest Krom, Deputy Administrative Assistant.
(Seal.)

[fol. 802] Contract W 33-038 ac-1669 (11543)

AFP: 543789 A

Class: 06-A

Fixed Price Service Contract

Army Air Forces

War Department

RJF:emf

Contractor: Standard Oil Company of Louisiana.

Contract for: Storage, Handling and Delivery of Aircraft Engine Fuel.

Place: Army Air Forces, Materiel Command, Wright Field, Dayton, Ohio.

The Finance Officer, U. S. Army, Mutual Home Building, 120 West 2nd Street, Dayton 2, Ohio, is designated as the officer to make payments in accordance with this contract.

The services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to the following Allotments, the available balances of which are sufficient to cover the cost of same.

2-4006 P 412-07 A 212/40705	Not to Exceed	$58,140.00
2-4006 P 412-08 A 212/40705	Not to Exceed	$ 4,800.00
Total	Not to Exceed	$62,940.00

[fol. 803]

Fixed Price Service Contract

Army Air Forces

War Department

This contract entered into this 14th day of January, 1944, by and between The United States of America, hereinafter called the "Government", represented by the Contracting Officer executing this contract,* and Standard Oil Company of Louisiana, a corporation organized and existing under the laws of the State of Louisiana, having a place of business in the City of New York, in the State of New York, hereinafter called the "Contractor",

Witnesseth

Whereas, in the prosecution of its war effort, the Government deems it necessary to contract with various individuals, firms, associations, or corporations, for the storage and handling of aviation fuel and the rendering of miscellaneous services in connection therewith at strategically situated locations throughout the United States, and

Whereas, it has been administratively determined that established facilities of the Government are inadequate to provide these essential services and therefore the execution of such agreements will promote the interests of the Government, and

Whereas, the Contractor represents that it is the owner of, and/or can provide storage and handling facilities adequate for the storage and handling of Government-owned aviation fuel under this contract, and possesses the means and ability to perform other necessary services in connection therewith.

Now, therefore, in consideration of the premises and of the mutual covenants and agreements herein contained and for other good and valuable considerations, the parties hereto agree as follows:

Article 1—Scope of This Contract

(a) The Contractor shall furnish and supply to the Government storage and handling facilities in the capacities,

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* This contract was negotiated under the authority of the First War Powers Act, 1941, and Executive Order No. 9001, December 27, 1941.

at the points, and for the prices indicated in Exhibit "A", which is hereto attached and hereby made a part hereof and shall render services in connection therewith, as hereinafter more particularly described, in receiving, storing, handling and loading Government-owned fuel (the word "fuel" as used hereinafter shall mean Government-owned fuel unless otherwise specified) of the grade or grades indicated in said Exhibit "A". Said services shall be performed when and as, during the period or periods indicated in said Exhibit "A", the Government shall request and direct the Contractor to supply the same. Said services shall be as follows:

[fol. 804] (1) To order stocks of fuel to be shipped to Contractor's storage facilities as may be directed by the Contracting Officer.

(2) To receive such stocks of fuel into such storage facilities, and store the same as may be directed by the Contracting Officer.

(3) To load and ship such stocks of fuel from such storage facilities as may be directed by the Contracting Officer.

(4) To keep a complete and adequate record of and, if necessary, to trace and expedite all shipments on orders placed and on loadings made by the Contractor as directed under the terms hereof.

(5) To render reports as of 0800 o'clock daily, by telegraph or telephone, at the expense of the Government, giving the following information pertaining to each terminal (storage from which shipments are regularly made to more than one point):

(a) Total amount of each grade of fuel shipped during the preceding twenty-four (24) hours.

(b) Tank car numbers by grade to each destination.

(c) Balances of each grade of fuel on hand at the close of the twenty-four (24) hours covered by the report.

(6) To render reports in duplicate by mail (air mail if normal mailing time is over twenty-four (24) hours) covering in detail receipts, shipments and losses or

gains for the following periods of each month: First to eighth, inclusive; ninth to fifteenth, inclusive; sixteenth to twenty-third, inclusive, and twenty-fourth to the last day thereof, inclusive. This quarter monthly report shall contain all the information provided for in and shall be prepared as an affidavit on "Government Owned Stock Report", Air Service Command Form No. 2013. Upon request of the Contractor directed to the Property Officer, Fuels and Lubricants Branch, Air Service Command, Patterson Field, Fairfield, Ohio, blank forms No. 2013 will be made available to the Contractor.

[fol. 805] (7) To render any additional reports in such other form or fashion as may be directed in writing by the Property Officer, Fuels and Lubricants Branch, Air Service Command, Patterson Field, Fairfield, Ohio, relating to the reporting of stock balances, receipts, loadings, deliveries and stock losses or gains.

(8) To provide and maintain adequate equipment and personnel sufficient for proper storage and efficient handling of all shipments received and loadings made which may be called for under the terms hereof and to accomplish all such services in accordance with the best standard commercial practices.

(b) Contractor shall make necessary preparations or alterations in the loading and unloading facilities at its storage point or points in order to perform efficiently the services rendered hereunder in accordance with standard commercial practice, and shall clean and/or condition or recondition said facilities to make them suitable for the handling of aviation fuel.

(c) The Contractor shall exercise due diligence in placing such orders and making such deliveries as may be directed under the terms of Paragraph (a) hereof and shall accomplish the receipt and delivery of such stocks of fuel within a reasonable time after receipt of instructions from the Contracting Officer therefor. Contractor shall have the responsibility of maintaining stocks of fuel in its storage facilities sufficient to meet through-put requirements, provided that the fuel is available and allocated at

the refineries or sources thereof and provided transportation facilities are adequate.

(d) Contractor shall provide a responsible source of contact twenty-four hours a day, seven days a week, at or near the storage facilities referred to in Exhibit "A" for the purpose of receiving such instructions as may be issued under the terms of this contract and the Contractor shall immediately, upon execution of the contract, provide the Commanding General, Air Service Command, Patterson Field, Fairfield, Ohio, Attention: Property Officer, Fuels and Lubricants Branch, with the name or names, addresses and telephone numbers of the respective responsible parties assigned to such storage facilities.

[fol. 806] (e) Contractor shall be responsible, until delivery thereof has been accomplished, for the total gallonage received at its storage facilities on the basis of volume, determined as hereinafter set forth, corrected to 60° F.:

(1) Receipts made from tank wagon or tank truck (of under 4000 gallons capacity): On an actual volume basis, without temperature correction,

(2) Receipts made from tank car or tank truck (of 4000 gallons capacity or more): on a volume basis corrected to 60° F.

Provided that if any such conveyance referred to in (1) or (2) shows, after proper gauging, a volume, corrected to 60° F. when required hereunder, in excess of one per cent (1%) less than the volume, similarly corrected, shipped as the same appears on the bill of lading or equivalent shipping document, the Contractor shall, jointly with the local freight agent or truck operator, and the Army Air Forces Inspector in charge, if available, determine the actual shortage or loss, and the Contractor shall notify the Commanding General, Air Service Command, Patterson Field, Fairfield, Ohio, Attention: Property Officer, Fuels and Lubricants Branch, by telegram of the amount of shortage and the reason therefor, if known. In case of any such shortage the Contractor shall sign the bill of lading or equivalent shipping document for the actual quantity received and not for the quantity shipped. As used in

(1) and (2) hereof the words "volume basis" mean volume measured by gauge, if any, on said conveyance and if none, then by gauge on Contractor's receiving facilities.

(3) Receipts made from tanker, barge or other vessel: on a volume basis corrected to 60° F.

Provided that such vessel and the receiving shore tanks shall be gauged jointly by the Contractor, the master of the vessel and the Army Air Forces Inspector in charge, if available, before the unloading of the vessel and again after such unloading; in the event that the volume, corrected to 60° F., received by the Contractor is in excess of one per cent (1%) less than the volume, corrected to 60° F., shipped in such vessel as appears on the applicable shipping document, the actual shortage or loss shall be determined by the aforementioned parties and the Contractor shall notify the Commanding General, Air Service Command, Patterson Field, Fairfield, Ohio, Attention: Property Officer, Fuels and Lubricants Branch, by telephone of the amount of such shortage and the reason therefor, if known. In case of such shortage, the Contractor shall sign the Marine bill of lading or applicable shipping document for the actual quantity received and not for the quantity shipped.

[fol. 807] (f) Contractor shall be allowed not to exceed one per cent (1%) for any loss of volume in fuel for each through-put at its storage facilities and the amounts of such losses shall be indicated on the monthly reports called for under Paragraph (a) (7) hereof. In the event of any shortages or losses in excess of the limitations herein imposed, the Contractor shall submit to the Property Officer herein named, a statement of such losses within ten (10) days after the date of expiration or termination of this contract, together with the reasons therefor, if known; and the Contractor shall not be liable, under the terms hereof, for such excessive shortages or losses unless the same result from gross negligence, bad faith, or willful misconduct on the part of one or more of the Contractor's corporate officers or other representatives having supervision or direc-

tion of the operation of the whole of the Contractor's business or of the whole of any terminal or bulk plant or storage facilities operated by the Contractor and used in the performance of this contract.

(g) All shipments made by common carrier under the terms hereof either to or from Contractor's storage facilities shall be made on Government bills of lading. Contractor shall mail applications for such Government bills of lading to the Commanding General, Air Service Command, Patterson Field, Fairfield, Ohio, Attention: Property Officer, Fuels and Lubricants Branch. In the event that the Contractor is instructed, under the terms of this contract, to ship fuel on collect commercial bills of lading for conversion to Government bills of lading, the original and two (2) memorandum copies of such collect commercial bills of lading will be mailed to the Transportation Officer at destination and upon shipments to destinations where there is no Transportation Officer regularly assigned, such as terminals or other activities, the above-mentioned collect commercial bills of lading shall be mailed to the Commanding General, Air Service Command, Patterson Field, Fairfield, Ohio, Attention: Commercial Transportation Section, where such bills of lading will be converted to Government bills of lading.

(h) In the event Contractor violates any instructions as to delivery of fuel out of its storage facilities, either as to method, date, quantity, destination or grade, or otherwise, which may be specified under the terms hereof, the transportation costs involved in such unauthorized delivery shall be deducted from amounts otherwise due the Contractor herunder.

(i) The parties agree the services described herein, if any, heretofore performed by the Contractor, at the request of the Government, were in contemplation of and are subject to the provisions of this contract, the same as though performed by the Contractor after the date of execution hereof.

(j) All reports called for under the terms of this Article shall be made to the Commanding General, Air Service Command, Patterson Field, Fairfield, Ohio, Attention: Property Officer, Fuels and Lubricants Branch.

[fol. 808] Article 2—Consideration

The Government will pay to the Contractor, upon satisfactory performance of the services herein specified, the prices set forth in Exhibit "A" during the period specified therein or any extension or renewal thereof, if such extension or renewal is provided for elsewhere in this contract. For payment purposes the gallonage handled by Contractor through its storage facilities shall be determined as follows:

(1) Upon loadings made into tank wagon or tank truck (under 4000 gallons capacity): on an actual volume basis without temperature correction.

(2) Upon bulk loadings by any other means (4000 gallons capacity or more): on a volume basis corrected to 60° F.

(3) As used in (1) and (2), the words "volume basis" mean volume measured by gauge, if any, on said conveyance or vessel and if not, then by gauge on Contractor's delivering facilities.

Article 3—Inspection and Acceptance for Payment

(a) The point or points for inspection and acceptance for payment by the Government for the handling and delivery of Government-owned aircraft engine fuel and oil covered by this contract shall be the point or points at which the fuel and oil is serviced into aircraft. Inspection as referred to shall be visual inspection and no certificate or analysis data will be required for deliveries into aircraft.

(b) Payment will be made by the Government upon receipt of the following:

(1) Invoices properly prepared and certified. Invoices shall be prepared in quadruplicate and addressed to the Finance Officer at the location designated on the cover page hereof. Such invoices shall indicate the gallonage of fuel and oil serviced into aircraft and the unit prices for such delivery and the name of the airport at which such deliveries were made. Each invoice shall be serially numbered and dated. The original and first copy shall be mailed to said Finance Officer. The triplicate and quadruplicate copies shall be mailed direct to the Accountable Officer

or Supply Officer designated in Article 8 hereof. The [fol. 809] Accountable Officer will prepare the necessary receiving and accountability reports and forward such papers with the triplicate copy of the invoice to said Finance Officer for payment. The Accountable Officer referred to above will submit receiving and accountability reports covering semi-monthly periods unless otherwise agreed upon by the Contractor and the Accountable Officer referred to herein.

(2) The invoices submitted by the Contractor shall be accompanied by substantiating Stores Charge, Army Air Forces Form No. 81, each in quadruplicate, itemizing the fuel and oil delivered to each airplane. Except at stations where Army Air Forces personnel are permanently stationed, the Contractor will be responsible for the preparation of the Stores Charge Form No. 81. Where Army Air Forces personnel are permanently stationed, the Commanding Officer or his authorized representative will be responsible for the preparation of the Stores Charge Form No. 81. This form must be signed by the Pilot or Flight Supply Officer or one of his authorized representatives. The Form No. 81 for each transaction will, in each case, indicate the serial number of the airplanes serviced and the name of the home station of the airplanes serviced and contract number. A supply of Army Air Forces Form No. 81 will be made available to Contractors by the Accountable Officer when requested. If, for any reason, the Contractor's supply of Form No. 81 becomes exhausted before replenishment supply can be obtained, the Contractor's representative at the airport shall call upon the Pilot or Flight Commander to furnish the necessary Forms No. 81. Distribution of the completed forms will be made as follows:

Original and duplicate copy:

To the Accountable Officer at the same time invoices are submitted.

Triplicate Copy:

To be retained by Contractor.

Quadruplicate copy:

To be retained by the Pilot or Flight Supply Officer.

[fol. 810] EXHIBIT "A" TO CONTRACT W 33-038 AC-1669

1. The Contractor shall perform services when and as, during the period beginning 1 December 1943, and continuing to and including 30 June 1944, the Government, represented by the Contracting Officer, shall request and direct in storing Government-owned aircraft engine fuel, Grade 91, at its airport storage located at Johnson City Municipal Airport (also known as Tri-Cities Airport), Johnson City, Tennesse, and shall handle and deliver the same from said airport storage into aircraft of the Government stopping at said airport at the unit price of $0.052 per gallon, and at the total price for such services shall be an amount not to exceed $2,340.00.

2. The Contractor shall perform services when and as, during the period beginning 1 December 1943, and continuing to and including 30 June 1944, the Government represented by the Contracting Officer, shall request and direct in storing Government-owned aircraft engine fuel, Grade 91 and/or 130, at its airport storage located at Knoxville Municipal Airport, Knoxville, Tennessee, and shall handle and deliver the same from said airport storage into aircraft of the Government stopping at said airport at the unit price of $0.062 per gallon, and at the total price for each services shall be an amount of not to exceed $55,800.00.

3. The Contractor shall, when and as, during the period beginning 1 December 1943 and continuing to and including 30 June 1944 the Government, represented by the Contracting Officer, shall request and direct, furnish and deliver to the Government f. o. b. aircraft of the Government or such other aircraft as may be designated by the Contracting Officer stopping at Johnson City Municipal Airport, Johnson City, Tennessee or Knoxville Municipal Airport, Knoxville, Tennessee, not to exceed Six Thousand (6,000) gallons aircraft engine lubricating oil, Grade 1120 conforming to Army-Navy Aeronautical Specification No. AN-VV-O-446A dated January 5, 1943 or Grade 1100p conforming to Army-Navy Aeronautical Specification No. AN-0-5 dated

April 27, 1943, both hereby made a part hereof at the unit price of $0.80 per gallon, and at the total price of not to exceed ..... $4,800.00.

4. The following provision shall be applicable to the supplies furnished by the Contractor under the terms of paragraph 3 of this Exhibit "A".

"*Walsh-Healey Act*—(a) The representations and stipulations required by Section 1 of the Act of June 30, 1936 (Walsh-Healey Act, Public No. 846, 74th Congress), to be included in all contracts therein specified are hereby incorporated and made a part of this contract with the same force and effect as if fully set forth in this contract; provided, however, that the foregoing shall not be applicable if this contract is for a definite amount not in excess of $10,000.

(b) The above-mentioned representations and stipulations shall be subject to all applicable and lawful regulations, determinations, exemptions and exceptions of the Secretary of Labor now or hereafter in effect."

[fol. 811] 5. In the event that any trucks or facilities employed by the Contractor in performing the services called for hereunder are equipped with rubber hose, said hose shall be of a type resistant to aromatics in concentrations of up to 40%.

6. Contractor shall provide the reporting authority designated by the Commanding General, Air Service Command, and located at Johnson City Municipal Airport, Johnson City, Tennessee, and Knoxville Municipal Airport, Knoxville, Tennessee, with such information as said reporting authority may require in order to enable it to comply with Air Service Command Regulation 15-72 dated June 14, 1943.

7. The Contractor shall be required to service, when so directed, any aircraft of the type herein specified, stopping at the airports referred to in paragraphs 1 and 2 of this Exhibit and Contractor shall make deliveries as herein specified upon call of the pilot or flight commander by placing the fuel and/or lubricating oil in the tanks of said air-

planes on the premises of the airport under the following conditions.

(a) Airplanes requiring a total of 500 gallons or less, shall be serviced within fifteen (15) minutes from the time of call.

(b) Airplanes requiring quantities from 500 to 1500 gallons of fuel shall be serviced within thirty (30) minutes from time of call.

(c) For group flights, sufficient notice will be given so that special arrangements can be made. Advanced notice will be given by Pilot or Flight Commander when quantities in excess of 1500 gallons of fuel will be required. In such cases, servicing shall be accomplished as promptly as possible but at a rate of not less than fifty (50) gallons per minute.

(d) The servicing shall be accomplished by means of tank vehicles or permanently-installed servicing pits. Tank vehicles may be of the truck power take-off type, or trailer-semi-trailer type equipped with built in or portable pumping units. In any case the Fuel must pass through a delivery system which will provide a delivery of not less than fifty (50) gallons per minute. In all cases the fuel shall be passed through strainers of one hundred (100) mesh or better, water and sediment traps, and accurate measuring devices. Suitable wires and attaching clip call bonding lines, shall be attached to each servicing nozzle. The attaching clip which will bond the nozzle electrically to a structural part of the airplane shall be attached to the airplane, not more than four (4) feet from the tank filler opening prior to insertion of the nozzle into the tank opening. This is required in order to reduce the fire hazard which would accompany a static discharge between the servicing nozzle and the tank opening in the presence of the highly inflammable gasoline vapors, and must be strictly complied with in all cases. A sketch of an approved type of nozzle bonding line will be furnished to Contractor on request made to the Commanding General, Air Service Command, Patterson Field, Fairfield, Ohio, Attention: Fuels and Lubricants Branch.

(e) Contractor shall make the necessary arrange-

ments for use of the above-mentioned airports for service of airplane as herein required. Upon execution of [fol. 812] this contract, the Contractor shall immediately ascertain and/or establish its right to service Government aircraft on the specified airports; provided that the Government shall have the right of inspecting and approving the procedure used by the Contractor in servicing Government-owned aircraft with fuel and lubricating oil.

8. The quantities set forth herein for each grade of fuel and oil and each station are estimates only and have been employed for the purpose of determining the maximum contract price. In the event that the Contractor, in accordance with instructions issued hereunder, delivers quantities in excess of the maximum quantities set forth for each station, the Contractor shall be paid therefor, in accordance with the terms of this contract, from the total sum of Sixty-two Thousand Nine Hundred Forty Dollars ($62,940.00) which has been allotted to this contract as of the date of execution hereof, provided, however that the Contractor shall not be obligated to furnish supplies or perform services under the terms hereof, which, if so furnished or performed, would entitle the Contractor to payments in excess of the total sum so allotted to this contract and the Government shall not be obligated to pay to the Contractor any amount in excess of said sum so allotted, and provided further, that if the Contractor furnishes supplies or performs services of the type called for hereunder for which funds are not allotted, such allotments may be increased from time to time and the Contracting Officer may ratify the delivery of such supplies or the performance of such services when funds are allotted therefor.

[redacted]

TO: Standard Oil Company of Louisiana, New York, New York
SUBJECT: Specification Change

1. Paragraph 3 of Exhibit "A" attached to and made a part of [redacted] W 33-038 ac-1669 is hereby deleted and in lieu thereof the following shall be substituted:

"The Contractor shall, when and as, during the period beginning 1 December 1943, and continuing to and including 30 June 1944, the Government, represented by the Contracting Officer, shall request and direct, furnish and deliver to the Government f.o.b. aircraft of the Government or such other aircraft as may be designated by the Contracting Officer stopping at Johnson City Municipal Airport, Johnson City, Tennessee or Knoxville Municipal Airport, Knoxville, Tennessee, not to exceed Six Thousand (6,000) gallons aircraft engine lubricating oil, Grade 1120 conforming to Army-Navy Aeronautical Specification No. AN-VV-O-[illegible] dated 5 January 1943, or Grade 1100 conforming to Army-Navy Aeronautical Specification No. AN-VV-O-446-a dated 5 January 1943, both hereby made a part hereof at the unit price of $0.70 per gallon, and at the total price of not to exceed - - - - - - - - - - - - - - - - - $4,200.00"

REASON: Since the Air Fields are situated in relatively warm climates, there is no objection to the use of Specification AN-VV-O-446-a Grade 1100 oil.

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VAFMC-[illegible] [illegible]-9-11-43-20M

Total	increase / decrease	fixed price	$
		in estimated cost	$ NOTHING
		fixed fee	$

Except as hereby amended, all the terms and conditions of the Contract affected shall remain unmodified and in full force and effect and shall also apply in carrying out the provisions of this Change Order.

UNITED STATES OF AMERICA

BY: C.T. WOODSMOTT, 1ST. LT., AIR CORPS
Contracting Officer.

1st Indorsement

New York, N.Y. Feb 29, 1944
(Place) (Date)

TO: CONTRACTING OFFICER:

Contractor hereby accepts the above Change Order.

[illegible]

(Contractor) (Seal)

BY: [illegible]
(Signature, Original with Office held)

FP No.: NONE

The supplies and services to be obtained by this instrument are authorized by, are for the purpose set forth in and are chargeable to the following allotments, the available balances of which are sufficient to cover cost of same:

NONE

[illegible] Contract No. [illegible]

COMPLAINANT'S EXHIBIT #29

AIRCRAFT ENGINE FUEL RELEASE

Complt's Ex. #29

Standard Oil Company, La. Ex Memphis, Tenn. Term.

Month JAN. 194 4 Grade 91 Contract No. P. O. No.

Zone 4 Sheet No. 1 Index No.

Written Confir. DEC. 22 194 3 By BLC:D Time 2:30 P.M. Where to phone

Noti. Phoned 194 By To Mr. Time

P. A. W. Allocation B'bls. Gallons

Gallons Ex. Via

Remarks

Fuel Unit OK. By JFK By Transportation Approved By JEF

RELEASE TO	SHIPPING ADDRESS	THRU BULK PLANT	ESTL. REQ. GALLONS	TYPE DEL.
GRENADA AAB	GRENADA, MISSISSIPPI		593,000	TT
BERRY FIELD	NASHVILLE, TENN.		191,000	TT
BLYTHEVILLE	BLYTHEVILLE, ARK.		4,000	TT
LEBANON AAB	LEBANON, TENN. THRU SMYRNA		4,000	GFSU
MEMPHIS M. A.	MEMPHIS, TENN.		335,000	GFSU
NORTHERN FIELD	TULLAHOMA, TENN.		63,000	TT
SMYRNA AAB	SMYRNA, TENN.		1,676,000	TT
HUNTSVILLE AAF	HUNTSVILLE, ALA.		12,000	TC
KNOXVILLE M. A.	KNOXVILLE, TENN.	KNOXVILLE BP	4,000	TT
COURTLAND AAB.	COURTLAND, ALA.		11,000	TT
GREENWOOD AAF	GREENWOOD, MISS.		188,000	TT

QUANTITIES SHOWN ARE ESTIMATED REQUIREMENTS ONLY AND ARE NOT RESTRICTIVE.

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COMPLAINANT'S EXHIBIT #30

STANDARD FORM NO. 1103a

U. S. GOVERNMENT BILL OF LADING
MEMORANDUM

NO. WT - 343183

Compl't's Ex. #30

CAR INITIALS AND NO.
Truck 72

NAME OF INITIAL TRANSPORTATION COMPANY
Motor Transport Co.

STOP THIS CAR AT FOR

TRAFF

SIZE CAR IN FT. ORDERED	SIZE CAR IN FT. FURNISHED	MARKED CAPACITY OF CAR ORDERED	MARKED CAPACITY OF CAR FURNISHED	DATE CAR FURNISHED	DATE B/L ISSUED

RECEIVED BY THE TRANSPORTATION COMPANY NAMED ABOVE, SUBJECT TO CONDITIONS NAMED ON THE REVERSE HEREOF, THE PUBLIC PROPERTY HEREINAFTER DESCRIBED IN APPARENT GOOD ORDER AND CONDITION (CONTENTS AND VALUE UNKNOWN), TO BE FORWARDED TO DESTINATION BY THE SAID COMPANY AND CONNECTING LINES THERE TO BE DELIVERED IN LIKE GOOD ORDER AND CONDITION TO SAID CONSIGNEE.

FROM (SHIPPING POINT)

FROM (FULL NAME OF SHIPPER)

MARKS
Transportation Officer
100th Sub-Depot
Cayrna, Tennessee

CONSIGNEE

DESTINATION
Cayrna, Tennessee
VIA (ROUTE (CONNECT ONLY WHEN SOME SUBSTANTIAL INTEREST OF THE GOVERNMENT IS INVOLVED THEREIN)

CHARGES TO BE BILLED TO (OR SERVICE AND LOCATION)

APPROPRIATION CHARGEABLE

ISSUING OFFICE

NAME AND TITLE OF ISSUING OFFICER
Transportation Officer

PICK-UP SERVICE AT ORIGIN was not BY THE GOVERNMENT.
(Insert "WAS" or "WAS NOT")
INITIALS OF SHIPPER'S AUTHORIZED AGENT OR EMPLOYEE

IF FURNISH THIS INFORMATION IN CASE OF CARLOAD SHIPMENTS ONLY.
*SHOW ALSO CUBIC MEASUREMENTS FOR SHIPMENTS VIA OCEAN CARRIER IN CASES WHERE REQUIRED.

PACKAGES NO.	PACKAGES KIND	DESCRIPTION OF ARTICLES (USE CARRIERS' CLASSIFICATION OR TARIFF DESCRIPTION IF POSSIBLE, OTHERWISE A CLEAR NONTECHNICAL DESCRIPTION)	NUMBERS ON PACKAGES	WEIGHTS*
		MILITARY Shippers No. Govt. T- 66 Carriers No. 1645 N.A.		
1	TT	Grade 91 3986 Shell Gallons		26308

CERTIFICATE OF ISSUING OFFICER

CONTRACT NO. OR PURCHASE ORDER NO. W-535-AC-36457 DATED 1-10-44

F. O. B. POINT NAMED IN CONTRACT

SIGNATURE OF ISSUING OFFICER

NAME OF TRANSPORTATION COMPANY
Motor Transport Co.

DATE OF RECEIPT OF SHIPMENT

SIGNATURE OF AGENT

MEMORANDUM COPY

(6)

COMPLAINANT'S EXHIBIT #31

STANDARD FORM NO. 1103a
FORM APPROVED BY COMPTROLLER GENERAL, U.S. 1943

U. S. GOVERNMENT BILL OF LADING
MEMORANDUM

NO. WT - 343187

Complt's Ex. #31 4-13-50

CAR INITIALS AND NO.
Truck 131-123

NAME OF INITIAL TRANSPORTATION COMPANY
Dealers Transport Co.

TRAFFIC

STOP THIS CAR AT FOR

SIZE CAR IN FT. ORDERED	SIZE CAR IN FT. FURNISHED	MARKED CAPACITY OF CAR ORDERED	MARKED CAPACITY OF CAR FURNISHED	DATE CAR FURNISHED	DATE B/L ISSUED
				[redacted]	

RECEIVED BY THE TRANSPORTATION COMPANY NAMED ABOVE, SUBJECT TO CONDITIONS NAMED ON THE REVERSE HEREOF, THE PUBLIC PROPERTY HEREINAFTER DESCRIBED IN APPARENT GOOD ORDER AND CONDITION (CONTENTS AND VALUE UNKNOWN), TO BE FORWARDED TO DESTINATION BY THE SAID COMPANY AND CONNECTING LINES, THERE TO BE DELIVERED IN LIKE GOOD ORDER AND CONDITION TO SAID CONSIGNEE.

FROM (SHIPPING POINT)
[redacted]

FROM (FULL NAME OF SHIPPER)
[redacted]

MARKS
[redacted]
Transportation Officer
410th Sub-Depot
Grenada, Miss.

CONSIGNEE
[redacted]

DESTINATION
Grenada, Miss.

VIA (ROUTE JOURNEY ONLY WHEN SOME SUBSTANTIAL INTEREST OF THE GOVERNMENT IS SUBSERVED THEREBY)

CHARGES TO BE BILLED TO
[redacted]

APPROPRIATION CHARGEABLE
[redacted]

ISSUING OFFICE
[redacted]

NAME AND TITLE OF ISSUING OFFICER
[redacted] Transportation Officer

PICK-UP SERVICE AT ORIGIN [redacted] BY THE GOVERNMENT.
(Insert "WAS" or "WAS NOT")
INITIALS OF SHIPPER'S AUTHORIZED AGENT OR EMPLOYEE [redacted]

†FURNISH THIS INFORMATION IN CASE OF CARLOAD SHIPMENTS ONLY
*SHOW ALSO CUBIC MEASUREMENTS FOR SHIPMENTS VIA OCEAN CARRIER IN CASES WHERE REQUIRED.

PACKAGES NO.	PACKAGES KIND	DESCRIPTION OF ARTICLES (USE CARRIERS' CLASSIFICATION OR TARIFF DESCRIPTION IF POSSIBLE, OTHERWISE A CLEAR NONTECHNICAL DESCRIPTION)	NUMBERS ON PACKAGES	WEIGHTS*
		MILITARY Shippers No. Gov't. T- 65 Carriers No. 34986		
1	TT	Grade 91 [redacted] 4250 Shell Gallons		28050
		[redacted]		

CERTIFICATE OF ISSUING OFFICER
CONTRACT NO. OR PURCHASE ORDER NO. W-535-AC-36457 DATED 1-10-44

F. O. B. POINT NAMED IN CONTRACT [redacted]

SIGNATURE OF ISSUING OFFICER
[redacted]

NAME OF TRANSPORTATION COMPANY
Dealers Transport Co.

DATE OF RECEIPT OF SHIPMENT

SIGNATURE OF AGENT PER

MEMORANDUM COPY

6

398

COMPLAINANT'S EXHIBIT #32

U. S. GOVERNMENT BILL OF LADING
MEMORANDUM

NO. WT - 313696

CAR INITIALS AND NO.
[redacted] 16-D

NAME OF INITIAL TRANSPORTATION COMPANY
MOTOR TRANSPORT COMPANY

STOP THIS CAR AT FOR

TRAFFI

SIZE CAR IN FT ORDERED	SIZE CAR IN FT FURNISHED	MARKED CAPACITY OF CAR ORDERED	MARKED CAPACITY OF CAR FURNISHED	STATE CAR FURNISHED	DATE B/L ISSUED
					DEC 1957

RECEIVED BY THE TRANSPORTATION COMPANY NAMED ABOVE, SUBJECT TO CONDITIONS NAMED ON THE REVERSE HEREOF, THE PUBLIC PROPERTY HEREINAFTER DESCRIBED, IN APPARENT GOOD ORDER AND CONDITION (CONTENTS AND VALUE UNKNOWN), TO BE FORWARDED TO DESTINATION BY THE SAID COMPANY AND CONNECTING LINES, THERE TO BE DELIVERED IN LIKE GOOD ORDER AND CONDITION TO SAID CONSIGNEE.

FROM (SHIPPING POINT)
[redacted]

FROM (FULL NAME OF SHIPPER)
[redacted]

CONSIGNEE
[redacted]

MARKS
TRANSPORTATION OFFICER
ADAMS FIELD
LITTLE ROCK, ARKANSAS

DESTINATION
LITTLE ROCK, ARKANSAS

CHARGES TO BE BILLED TO
[redacted]

APPROPRIATION CHARGEABLE
[redacted]

ISSUING OFFICE
[redacted]

NAME AND TITLE OF ISSUING OFFICER
[redacted] Transportation Officer

PICK UP SERVICE AT ORIGIN WAS NOT BY THE GOVERNMENT
(Insert "WAS" or "WAS NOT")
INITIALS OF SHIPPER'S AUTHORIZED AGENT OR EMPLOYEE G.B.L. CO

(FURNISH THIS INFORMATION IN CASE OF CARLOAD SHIPMENTS ONLY
*SHOW ALSO CUBIC MEASUREMENTS FOR SHIPMENTS VIA OCEAN CARRIER IN CASES WHERE REQUIRED.

PACKAGES NO.	KIND	DESCRIPTION OF ARTICLES (USE CARRIERS' CLASSIFICATION OR TARIFF DESCRIPTION IF POSSIBLE, OTHERWISE A CLEAR NONTECHNICAL DESCRIPTION)	NUMBERS ON PACKAGES	WEIGHTS*
		MILITARY		
		SHIPPER'S NO. GOVT.T. / CARRIERS NO. A-324LR		
1	PT	GRADE 9I		
		[redacted]		
		[redacted]		
		[redacted]		

CERTIFICATE OF ISSUING OFFICER

CONTRACT NO. OR PURCHASE ORDER NO. [redacted] DATED 12-4

F. O. B. POINT NAMED IN CONTRACT [redacted]

SIGNATURE OF ISSUING OFFICER [redacted]

NAME OF TRANSPORTATION COMPANY
MOTOR TRANSPORT COMPANY

DATE OF RECEIPT OF SHIPMENT

SIGNATURE OF AGENT PER

MEMORANDUM COPY

6

COMPLAINANT'S EXHIBIT #33

Complt's Ex. #33

SHIPPING NOTICE

Order No. 20V-T 275

Cust. Ord.

[illegible]DE TERMINAL, MEMPHIS, TENN.

FROM STANDARD OIL CO. OF LOUISIANA, at MEMPHIS, TENN., Jan 25 1944

[illegible] U.S. Army 70th Sub Depot P. O. Address

[illegible] Memphis State of Tenn County of Truck L454

[illegible] Equipment No. Tank L840

CONTENTS	QUANTITY
Gasoline	
Ess Ethyl Aviation 91	4305 @ 45
	1

THIS SHIPMENT HAS BEEN FORWARDED FREIGHT CHARGES

[illegible] 535 PM

[illegible] 4351

RECEIVED BY 70th Sub Depot

[illegible] J. W. [illegible]

Cameraman's Note:

This is poor copy, but is the best obtainable.

TER.-TRS.

MEMORANDUM INVOICE

RIVERSIDE TERMINAL, MEMPHIS, TENN.

Compl't's Ex. 33-A

Order No. GOV-T 225

Cust. Ord.

FROM STANDARD OIL CO. OF LOUISIANA, at MEMPHIS, TENN., Jan 25 1944

Consigned to U.S. Army 70th Sub Depot P. O. Address

Destination Memphis State of Tenn County of Shelby

Route Equipment No. TNT L840

CONTENTS	QUANTITY
Gasoline	
Esso Ethyl Aviation 91	4305 @ 45
	2

THIS SHIPMENT HAS BEEN FORWARDED FREIGHT CHARGES

NET GALLONS AT 60°

STANDARD OIL CO. OF LOUISIANA, SHIPPER

RECEIVED BY 70th Sub Depot

400

COMPLAINANT'S EXHIBIT #33-A

820

[fol. 821] COMPLAINANT'S EXHIBIT No. 34

This Instrument Made and entered into on this the 10th day of March, 1944, by and between Lion Oil Refining Company, party of the first part, hereinafter called the Lessor, and Standard Oil Company of Louisiana, party of the second part, hereinafter called the Lessee,

Witnesseth:

That for and in consideration of the rental hereinafter stipulated and in consideration of the mutual obligations and covenants hereinafter promised and assumed, the Lessor does hereby lease and demise for a period from January 12, 1944 to June 30, 1944, both dates inclusive, unto the Lessee the following described premises located at the interseetion of Riverside Boulevard and Wisconsin Avenue in Memphis, Shelby County, Tennessee, to-wit:

> The premises designated and delineated upon the attached plat, which is made an exhibit and part hereof, and including tanks One, Two and Three, each having a capacity of 10,000 barrels, and including all piping, equipment and structures that are now on the demised premises.

The Lessee agrees to pay to the Lessor as rent for the above described property the sum of Four Hundred and Fifty Dollars ($450.00) a month, the rent to be due and payable at the expiration of each calendar month, and occupancy for fractional parts of a month shall be paid for prorata on a monthly basis.

The Lessor shall pay all taxes and assessments for local improvements during the period of this lease.

Lessor agrees to maintain the Foamite and Water lines now upon the premises and to maintain and keep available a supply of Foamite and Water in said lines. Lessee agrees to pay to Lessor the reasonable value of any Foamite and/or Water used from said lines.

[fol. 822] In Testimony Whereof the parties have hereunto set their hands, in duplicate originals, on the day and date first above written.

Lion Oil Refining Company, Lessor, by A. F. Reed, Vice President; Standard Oil Company of Louisiana, Lessee, by M. E. West.

26—330, 338

402A

REVISIONS			
NO.	DATE	DESCRIPTION	CHKD.

Property of LION OIL REFG. CO.

12" O.D. Ft. Riverside Blvd. Project Line

3 Spcs @ 101'-0" = 303'-0"

Note: Disconnect All Lion Oil Lines Except Foamite & Water Lines & Blind Off.

TANK NO. ONE 10,000 Bbls

TANK NO. TWO 10,000 Bbls.

TANK NO. THREE 10,000 Bbls.

101'-0"

6" Std. Bends

Note:- Two 6" Pipe Lines To Be Laid With 6' 18" Below Grade

Pipe Lines To Be Laid To Property Line By Lion Oil Refg. Co. & Standard Across Street By Stanford Co. Co.

Fence & Property Line

WISCONSIN AVENUE

Property of STANDARD OIL COMPANY

Note:- All Piping To Be Welded With Welded Or Flanged Steel Fittings

Cameraman's Note:

This is poor copy, but is the best obtainable.

REVISIONS			
NO.	DATE	SUBJECT	

REFERENCE DRAWINGS

LION OIL REFINING CO.
EL DORADO, ARKANSAS

PROPOSED PIPING CHANGES FOR TANKS NOS. 1 2 3 MEMPHIS TERMINAL

DRAWN BY: J.S.A. DATE:
CHECKED: T.B.Stamps 2/26/52 DRAWING NO.
APPROVED:
APPROVED:
SCALE: 1" = 20'-0"

C-36-510

(402 B)

LEASE AGREEMENT

LION OIL REFINING COMPANY,
Lessor,

And

STANDARD OIL COMPANY OF LOUISIANA,
Lessee.

MAR 10 1944
STANDARD OIL CO. OF LOUISIANA MEMPHIS, TENN.

824-825

BURCH, MINOR & McKAY
LAWYERS
1006 EXCHANGE BUILDING
MEMPHIS, TENN.

[fol. 826]

COMPLAINANT'S EXHIBIT 35

UNITED STATES OF AMERICA

Department of the Air Force

Dayton, Ohio, 4 May 1950

I hereby certify that the attached documents are true copies of signed copies of Contract No. W 535 ac-36457, dated 9 June 1943, and Supplemental Agreements No. 6 and 7 thereto, on file in the Air Materiel Command Contract, Research and Development Records Depository, Wright-Patterson Air Force Base, Dayton, Ohio. I further certify that the contracts from which the attached copies have been reproduced are part of the official files of The United States of America.

R. C. Brown, Captain, USAF.

I hereby certify that R. C. Brown, Captain, USAF, who signed the foregoing certificate, is the Base Adjutant and Records Officer, Wright-Patterson Air Force Base, Dayton, Ohio, and that to his certification as such full faith and credit are and ought to be given.

In testimony whereof I, Thomas K. Finletter, Secretary of the Air Force, have hereunto caused the seal of the Department of the Air Force to be affixed and my name to be subscribed by the Administrative Assistant to the Secretary of the Department, at the City of Washington, this 10 day of May, 1950.

Thomas K. Finletter, Secretary of the Air Force, by
John J. McLaughlin, Administrative Assistant.
(Seal.)

[fol. 827] Contract W 535 ac-36457 (9729)

AFP: A-4197, 49838 A

Class: 06-A

Fixed Price Service Contract

Army Air Forces

War Department

Contractor: Standard Oil Company of Louisiana

Contract For: Storage, handling and delivery of Aircraft Engine Fuel and other miscellaneous services.

Place: Army Air Forces, Materiel Center, Wright Field, Dayton, Ohio.

The Finance Officer, U. S. Army, 26 Journal Square, Jersey City, New Jersey, is designated as the officer to make payments in accordance with this contract.

The services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to the following Procurement Authorities, the available balances of which are sufficient to cover the cost of same.

AC 3040 P 412-07 A 0705-23	Not to Exceed	$376,925.44
AC 3040 P 412-03 A 0705-23	Not to Exceed	8,880.00
		$385,805.44

Approved: June 21, 1943. By Direction of the Secretary of War Under the Provisions of the First War Powers Act, 1941, and Executive Order No. 9001, December 27, 1941.

A. E. Jones, Brig. Gen., U.S.A., Chief, Procurement Division, Materiel Command.

[fol. 828] Contract No. W 535 ac-36457 (9729)

Fixed Price Service Contract

Army Air Forces

War Department

This contract entered into this 9th day of June, 1943, by and between The United States of America, hereinafter called the "Government", represented by the Contracting

Officer,* and Standard Oil Company of Louisiana, a corporation organized and existing under the laws of the State of Louisiana, having a place of business in the City of New York, in the State of New York, hereinafter called the "Contractor".

Witnesseth

Whereas, in the prosecution of its war effort, the Government deems it necessary to contract with various individuals, firms, associations, or corporations, for the storage and handling of aviation fuel and lubricants and the rendering of miscellaneous services in connection therewith at strategically situated locations throughout the United States, and

Whereas, it has been administratively determined that established facilities of the Government are inadequate to provide these essential services and therefore the execution of such agreements will promote the interests of the Government, and

Whereas, the Contractor is the owner of storage and handling facilities and possesses the means and ability to perform other necessary services in connection therewith for the storage and handling of Government aviation fuels,

Now, therefore, in consideration of the premises and of the mutual covenants and agreements herein contained and for other good and valuable considerations, the parties hereto agree as follows:

Article 1—Scope of this Contract

(a) The Contractor shall furnish and supply to the Government storage and handling facilities at the points indicated in Exhibit "A", which is hereto attached, and hereby made a part hereof, and render services in connection therewith, as hereinafter more particularly described, in receiving, storing, handling, loading and delivering Government-owned fuel. Said services shall be performed when and as, during the period beginning January 1, 1943 and ending June 30, 1943, the Government shall request and direct Con-

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* This contract was negotiated under the authority of the First War Powers Act, 1941, and Executive Order No. 9001, December 27, 1941.

tractor to supply the same. Said services shall be as follows:

(1) To order Government-owned stocks of fuel to be shipped to Contractor's terminals or bulk plants from such sources as may be directed by the Contracting Officer.
[fol. 829] (2) To receive Government-owned stocks of fuel into Contractor's bulk plants and terminals for storage as required by instructions issued by the Contracting Officer.
(3) To deliver Government-owned stocks of fuel from Contractor's bulk plants and terminals in such manner or to such destinations as may be directed by the Contracting Officer.
(4) To keep a complete and adequate record of and to trace and expedite all shipments upon orders placed and all deliveries made by the Contractor as directed under the terms hereof.
(5) To render daily telegraphic reports upon all tank car shipments from Contractor's terminals or bulk plants setting forth in each report, tank car serial numbers, quantity and grade loaded therein, and the destination thereof.
(6) To render reports, in duplicate, by mail (air mail, if normal mail time is over 24 hours) covering the following periods of each month, 1st to 7th inclusive, 8th to 15th inclusive, 16th to 23rd inclusive, 24th to last day thereof inclusive, and setting forth all shipments from Contractor's terminals or bulk plants during the period made by any type of conveyance indicating in each report the method of shipment, quantity and grade of each shipment, the date and destination thereof, including truck identifications, if any, the serial numbers of tank cars and Government bill of lading numbers. Such reports shall be mailed by the Contractor within two (2) days after the expiration of the period covered thereby.
(7) To render monthly reports, in duplicate, on Government stocks of fuel, in each of Contractor's terminals or bulk plants, on a volume basis at 60° F, setting forth the following details, for the period covered thereby. Such reports shall be made for each calendar month and shall be mailed by the Contractor on or before the twentieth of the month following the month covered by the report.

(a) Stocks on hand at the beginning of the period.

(b) The amount of fuel received by the Contractor during the period and the source and method of delivery of the same, including serial numbers of tank cars and Government bill of lading numbers and truck identifications, if any.

(c) The cumulative total amount of fuel delivered by the Contractor during the period.

[fol. 830] (d) The net balance of the fuel on hand at the end of the period.

(e) Total net loss or gain of Government fuel incurred in bulk plant or terminal operations during the period (which loss amount shall not be in excess of one-half of one per cent (.5%) less than the opening monthly inventory plus the receipts for the month as shown in the report).

(f) Any additional reports in such other form or fashion as may be agreed upon in writing between the Contractor and the Contracting Officer relating to the reporting of stock balances, receipts, shipments and stock losses or gains.

(8) To provide and maintain adequate equipment and personnel sufficient for efficient handling of all shipments and deliveries which may be called for under the terms hereof.

(b) In the event that Exhibit "A" so provides, the Contractor shall, when and as it may be so directed by the Contracting Officer, furnish and deliver lubricating oil into aircraft as specified in Exhibit "A" and/or shall provide storage and handling services as provided in paragraph (a) hereof in connection with Government-owned lubricating oil as specified in Exhibit "A".

(c) The Contractor shall make necessary preparations or alterations in the loading and unloading facilities at its terminals or bulk plants as shall be required in order to perform efficiently the services rendered hereunder and shall clean and/or condition or recondition said facilities and place them in proper condition for the handling of aviation fuel and lubricants.

(d) The Contractor shall exercise due diligence in placing such orders and making such deliveries as may be directed under the terms of paragraph (a) hereof and shall accom-

plish the receipt and delivery of such Government-owned stocks within a reasonable time after receiving instructions from the Contracting Officer therefor; a reasonable time to be determined by the length of the haul from source to Contractor's terminal or bulk plant or from Contractor's terminal or bulk plant to destination. The Contractor shall have the responsibility of maintaining stocks of fuel and lubricants (if Exhibit "A" specifies lubricants at any point) in its terminals or bulk plants sufficient to meet through-put requirements, provided that the fuel and lubricants are available and allocated at the refinery or sources thereof and provided that transportation facilities are adequate.

(e) The Contractor shall provide a responsible source of contact 24 hours a day, 7 days a week at or near terminal or bulk plant referred to in Exhibit "A" for the purpose of receiving such instructions as may be issued under the terms of this contract and Contractor shall immediately, upon execution of the contract, provide the Commanding General, Air Service Command, Patterson Field, Fairfield, Ohio, Attention: Property Officer, Fuels and Lubricants Branch with the names, addresses and telephone numbers of the respective responsible parties assigned to each terminal or bulk plant.

[fol. 831] (f) Contractor shall be responsible until delivery thereof has been accomplished for the total gallonage received at its terminals or bulk plants on the basis of volume corrected to 60° F. Total gallonage received shall be determined according to the following provisions:

(i) Receipts made from tank wagon or tank truck (of under 4000 gallons capacity): on an actual volume basis, without temperature correction.

(ii) Receipts made from tank car or tank truck (of 4000 gallons capacity or more): on a volume basis corrected to 60° F.

Provided that if any such conveyance referred to in (i) or (ii) shows, after proper gauging, a volume in excess of one-half of one per cent (.5%) less than the volume shipped, as the same appears on the bill of lading or equivalent shipping document, the Contractor shall, jointly with the local freight agent or truck oper-

ator, and the Army Air Forces Inspector in charge, if available, determine the actual shortage or loss, and the Contractor shall notify the Commanding General, Air Service Command, Patterson Field, Fairfield, Ohio, Attention: Property Officer, Fuels and Lubricants Branch, by telegram of the amount of shortage and the reason therefor, if known. In case of any such shortage the Contractor shall sign the bill of lading or equivalent shipping document for the actual quantity received and not for the quantity shipped.

(iii) Receipts made from tanker, barge or other vessel: on a volume basis corrected to 60° F.

Provided that such vessel and the receiving shore tanks shall be gauged jointly by the Contractor, the master of the vessel and the Army Air Forces Inspector in charge, if available, before the unloading of the Vessel and again after such unloading; in the event that the volume, corrected to 60° F., received by the Contractor is in excess of one-half of one per cent (.5%) less than the volume, corrected to 60° F., shipped in such vessel as appears on the applicable shipping document, the actual shortage or loss shall be determined by the aforementioned parties and the Contractor shall notify the Commanding General, Air Service Command, Patterson Field, Fairfield, Ohio, Attention: Property Officer, Fuels and Lubricants Branch by telephone of the amount of such shortage and the reason therefor, if known. In case of such shortage, the Contractor shall sign the Marine bill of lading or applicable shipping document for the actual quantity received and not for the quantity shipped.

[fol. 832] Contractor shall be allowed not to exceed one half of one per cent (.5%) for any losses in volume of fuel for each through-put at its terminals or bulk plants and any such losses shall be indicated on the monthly reports called for under paragraph (a) (7) hereof.

(1) In the event of any shortages or losses in excess of the limitations herein imposed, the Contractor shall submit to the Property Officer herein named, a statement of such

losses within ten (10) days after the date of expiration or termination of this contract, together with the reasons therefor, if known, and the Contractor shall not be liable, under the terms hereof, for such excessive shortages or losses unless the same result from negligence or willfull misconduct on the part of the Contractor's corporate officers or other representatives having supervision or direction of the operation of the whole of the Contractor's business or of the whole of any terminal, bulk plant or handling facilities operated by the Contractor and used in the performance of this contract.

(g) All shipments made by common carrier (including trucking companies under contract to the Government) under the terms hereof either to or from contractor's terminals or bulk plants shall be made on Government bills of lading. Contractor shall make application for such Government bills of lading to the Commanding-General, Air Service Command, Patterson Field, Fairfield, Ohio, Attention: Fuels and Lubricants Branch.

(h) In the event Contractor violates any instructions as to delivery of fuel or lubricants (if lubricants are specified in Exhibit "A") either as to destination or grade which may be specified under the terms hereof; the cost involved in such unauthorized delivery shall be deducted from amounts otherwise due the Contractor hereunder.

(i) It is mutually understood and agreed that the gallonage estimated to be handled by the Contractor at the various points set forth in Exhibit "A" shall not be construed as either a maximum or a minimum quantity for any of said points, said estimates being used only for the purpose of determining the approximate contract price for services estimated to be required of the Contractor by the Government under the terms hereof.

(j) In the event the necessity therefore arises the Contractor may commingle Government-owned stocks of fuel handled under the terms hereof with other stocks of fuel in its terminals or bulk plants provided that such other stocks have been received in properly sealed conveyances and taken from stocks which have been analyzed and found to satisfy the same specifications as the Government-owned stocks with which such other stocks are commingled. At

any terminal or bulk plant where such commingling takes place, Contractor shall keep separate records for all fuel handled under the terms of this contract.

(k) The Government agrees that trucks employed or used by the Contractor to make any deliveries hereunder, shall be promptly unloaded at any destination thereof, and that demurrage charges will be incurred by the Government for any delay in excess of one (1) hour, exclusive of unloading time, after the arrival of any such truck at proper destination and until unloading facilities are made available, and such demurrage, if any, will be paid by the Government as provided in paragraph (c) of Article 2.

(l) The parties agree that services and supplies as described herein, if any, heretofore performed or furnished by the Contractor, at the request of the Government, were in contemplation of and are subject to the provisions of this contract.

[fol. 833] (m) All reports called for under the terms of this Article shall be made to the Commanding General, Air Service Command, Patterson Field, Fairfield, Ohio, Attention: Property Officer Fuels and Lubricants Branch.

Article 2—Consideration

(a) The Government will pay to the Contractor upon satisfactory performance of the services specified in Article 1 hereof, the unit service price per gallon (Government-owned fuel or oil, if oil is specified in Exhibit "A") for the type of delivery accomplished by Contractor at the various points where Contractor's terminals or bulk plants are located as set forth in the schedule which has been identified as Exhibit "A". For payment purposes the fuel gallonage handled by Contractor at any point shall be determined as follows:

(1) Upon deliveries made by tank wagon or tank truck (under 4000 gallons capacity): on an actual volume basis with no temperature correction.

(2) Upon bulk deliveries by any other means (4000 gallons or more): on the basis of volume corrected to 60° F.

(b) In the event that Contractor furnishes and delivers to the Government any lubricating oil under the terms

hereof, the Government w r the unit price per gallon therefor "A".

(c) An additional reas ge, to be determined by the Contra er, in excess of $3.00 per successiv f, will be paid to the Contractor b ny delay in excess of the period set) of Article 1, and the Contractor s r no later than with the invoice app hich such claim for demurrage is in

Article 3—Inspection and t

(a) In all cases where very into aircraft, inspection and ac hall be as follows:

(1) Inspection and acc the Government for the handlin vernment-owned aircraft engine fuel s contract shall be the point at whic viced into aircraft. This provision w lubricating oil furnished and deliv under the provisions of this contrac raft. Inspection as referred to her tion only and no certificate of ana ired for delivery into aircraft.

(2) Payment will be ma f the following:

(a) Invoices properly I Invoices shall be prepared in qua ed to the Finance Officer designated f to make [fol. 834] payment. Thes the gallonage of fuel serviced in st for delivery thereof as well as furnished and unit cost thereof an which deliveries were made. Eac isly numbered and dated. The orig h invoice will be mailed to the Finan to. The triplicate and quadruplica direct to the accountable officer ref eof. The accountable officer will pr eiving ac-

countability reports and forward such papers to the Finance Officer together with the triplicate copy of the invoice for payment. The accountable officer referred to above will submit receiving and accountability reports covering the invoicing periods which shall be semi-monthly unless otherwise agreed upon by the Contractor and the accountable officer referred to herein.

(b) The invoices submitted by the Contractor shall be accompanied by substantiating Stores Charges, Army Air Forces Form No. 81, each in quadruplicate, itemizing the fuel and oil delivered to each airplane. Except at Stations where Army Air Forces personnel are permanently stationed, the Contractor will be responsible for the preparation of the Stores Charge Form No. 81. Where Army Air Forces personnel are permanently stationed, the Commanding Officer or his authorized representative will be responsible for the preparation of the Stores Charge Form No. 81. This form must be signed by the Pilot or Flight Supply Officer or one of his authorized representatives. The form No. 81 for each transaction will, in each case, indicate the serial number of the airplane serviced and the name of the home station of the airplane serviced and contract number. A supply of Army Air Forces Form No. 81 will be made available to Contractors by the Accountable Officer when requested. If, for any reason, the Contractors supply of Form No. 81 becomes exhausted before replenishment supply can be obtained, the Contractor's representative at the airport shall call upon the Pilot or Flight Commander to furnish the necessary Forms No. 81. Distribution of the completed forms will be made as follows:

1. Original and one (1) copy to the Accountable Officer at the same time invoices are submitted.

2. One (1) copy to be retained by Contractor.

3. One (1) copy to be retained by the Pilot or Flight Supply Officer.

[fol. 835] (b) In all cases where contractor makes delivery of fuel from terminal or bulk plant into tankers, barges, tank cars and/or other equipment operated by common carriers or into Government owned servicing units, or into equipment operated under contract with Govern-

ment, inspection and acceptance for payment shall be as follows:

(1) The point of inspection and acceptance for payment by the Government for the handling and delivery of Government owned aircraft engine fuel covered by this contract shall be the respective contractor's terminals or bulk plants indicated in Exhibit "A" from which the fuel is shipped to Army Air Forces activities or to other contractor's terminals or bulk plants. Inspection as referred to herein shall be certificate inspection.

(2) Payment will be made upon receipt of all of the following:

(a) Bills of lading signed by carrier's agent (except deliveries into Government servicing units or deliveries into equipment operated under contract with the Government).

(b) Invoices properly prepared and certified. Invoices shall be prepared in quadruplicate and addressed to the Finance Office designated on the cover page hereof to make payment. These invoices shall show quantities, destination to which delivery was made, bill of lading numbers, and dates of shipments. Each invoice shall be serially numbered and dated. The original and one copy of each invoice, will be mailed direct to the Finance Officer. The triplicate and quadruplicate copy will be mailed direct to the accountable officer refered to in Article 9 hereof. The accountable officer will prepare the necessary receiving and accountability reports certifying as to services rendered, and forward such papers together with the triplicate copy to the Finance Officer for payment. The accountable officer referred to above will submit receiving and accountability reports covering the invoicing periods which shall be weekly unless otherwise agreed upon by the Contractor and the accountable officer referred to herein.

(c) Certificates covering the same periods as invoices in sufficient quantity to cover distribution given below containing all the information provided for in the sample copy [attached hereto] * to and marked Exhibit "B" and hereby

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* Words enclosed in brackets struck out in copy.

made a part hereof. These certificates shall be prepared on letter-size paper, 8 x 10½ inches, and shall, on the same day that carrier's equipment or Government servicing units are loaded and/or released, be distributed as follows:

Original and one copy to: Commanding General, Air Service Command, Patterson Field, Fairfield, Ohio, Attention: Property Officer, Fuels and Lubricants Branch. [fol. 836] One copy to: Consignee, Properly Addressed, and handled as provided in paragraph (d) (1) hereof.

Two Copies to: Army Air Forces Inspector (Fuel & Oil) if such an Inspector is assigned to Contractor's terminal. If no Inspector is so assigned, certificates shall be mailed to Commanding General, Materiel Center, Wright Field, Dayton, Ohio, Attention: Fuel, Lubricants and Chemicals Unit, Inspection Section.

(c) In all cases where contractor makes deliveries of fuel into Government storage, inspection and acceptance for payment shall be as follows:

(1) The point of Inspection and Acceptance for payment by the Government for the handling and delivery of aircraft engine fuel covered by this contract shall be the point at which government storage is located as indicated in Exhibit "A". Inspection as referred to herein shall be certificate inspection.

(2) Payment will be made upon receipt of the following:

(a) Invoices properly prepared and certified. Invoices shall be prepared in quadruplicate and addressed to the Finance Officer designated on the cover page hereof to make payment. These invoices shall show quantities, name of Army Air Forces activity receiving the fuel and date of delivery. Each invoice shall be serially numbered and dated. The original and one copy of each invoice will be mailed direct to the Finance Officer. The triplicate and quadruplicate copy will be mailed direct to the accountable officer referred to in Article 9 hereof. The accountable officer will prepare the necessary receiving and accountability reports certifying as to services rendered and forward such papers together with the triplicate copy to the Finance Officer for payment. The accountable officer referred to above

will submit receiving and accountability reports covering the invoicing periods which shall be weekly unless otherwise agreed upon by the Contractor and the accountable officer referred to herein.

(b) Certificates covering the same period as invoices in sufficient quantity to cover the distribution given below, containing all the information provided for in the sample copy attached hereto and marked Exhibit "C" and hereby made a part hereof. These certificates shall be prepared on letter sized paper, 8 x 10½ inches and shall be distributed on the same day that tank trucks are loaded and/or released as follows:

Original and one copy to: Commanding General, Air Service Command, Patterson Field, Fairfield, Ohio, Attention: Property Officer, Fuels and Lubricants Branch.
[fol. 837] One Copy to: Consignee (Responsible person at Government Storage Point).

Two Copies to: Army Air Forces Inspector (Fuel & Oil) if such an Inspector is assigned to Contractor's plant. If no Inspector is assigned, certificates shall be mailed to Commanding General, Materiel Center, Wright Field, Dayton, Ohio, Attention: Fuel, Lubricants and Chemicals Unit, Inspection Section.

(d) The Contractor shall be governed by the following provisions where applicable, relating to shipments made under the terms hereof, and rights of inspection reserved by the Government.

(1) Consignee copy on tanker shipments shall be placed in a sealed envelope and be entrusted to the Captain or Master of the ship. Consignee copy on tank car shipments shall be placed in a sealed envelope and sent by first class mail. Consignee copy on tank truck or Government servicing unit shipments shall be placed in a sealed envelope and be entrusted to the driver of such tank truck or servicing unit.

(2) The Government reserves to itself the right of inspection and approving the procedure used at the contractor's plant in inspecting, cleaning, and sealing containers used for shipment of the above-mentioned fuel. In addition, any Contractor's terminal which possesses laboratory facili-

ties as of the date of this contract shall accomplish specification test of the above-mentioned fuel when requested by Army Air Forces Inspectors (Fuel & Oil).

(3) The Government reserves to itself the right of testing all aircraft engine fuel furnished under the terms of this contract subsequent to acceptance and payment, to determine if same meets all of the requirements of the specification under which same is furnished. The Government also reserves to itself the right of conducting preliminary inspection of the above-mentioned fuel prior to delivery and at the plant of the Contractor.

[fol. 838] Article 24—Plant Protection

(a) The Contractor shall at his own expense at all times during the term of this contract continue all such precautions, for the guarding and protection of its plant, property [fol. 839] and the work in process, as have immediately prior to the date of this contract been taken by it, and shall make available such information with respect thereto as the Contracting Officer may request.

(b) At any time during the term of this contract the Contracting Officer may require the Contractor to install and maintain in and about its plant additional protective equipment and personnel; and the Contractor shall promptly submit to said Contracting Officer detailed inventories, showing each item and the cost thereof, of any protective equipment so required and installed, and detailed statements of the cost of maintaining any personnel so required and maintained. Title to said protective equipment shall be in the Contractor. The Contractor shall at its own expense during the term of this contract maintain and keep in good condition and repair (for use in the performance of this contract) any protective equipment so required and installed, and, to the extent that, during said term, any of said protective equipment shall be lost, damaged, broken, worn out or destroyed, and/or otherwise require replacement, shall at its own expense make such replacement. The said Contracting Officer and authorized plant inspection personnel of the War Department shall at all times during the term of this contract have access to the Contractor's plant and the right to inspect and inventory said protective equip-

ment. The contract price will be adjusted by an amount equal to the reasonable cost (as determined by the said Contracting Officer) of any additional protective equipment or personnel so required to be installed or maintained, less the value (as determined by the said Contracting Officer) of said additional protective equipment at the completion or termination of this contract.

(c) The Contractor agrees to insert in each subcontract made in connection with the performance of this contract an article identical with the foregoing paragraphs (a) and (b), except that in place of the words "Contracting Officer" in paragraph (a), shall appear the words "United States Government, acting through the Contracting Officer in Contract No. W 535 ac-36457."

(d) This contract shall be modified in writing to increase the amount due the Contractor hereunder to the extent of any payments made by the Contractor to the Subcontractor under any subcontractual provision inserted pursuant to paragraph (c) hereof.

(e) For the purpose of this Article, a subcontract is defined as any contract or agreement entered into between the Contractor and any other party for the performance of all or any part of the work called for under this contract.

(f) The term "plant" as used herein shall include any transportation facilities or other equipment used by the Contractor in the performance of the services called for hereunder.

[fol. 840] (g) In the event that Contractor does not, during the term of this contract, maintain a 24 hour per day guard at the storage facilities, terminals or bulk plants used in connection with this contract, Contractor shall seal all inlet and outlet valves and other openings on such equipment, by numbered seal and the number of each such seal shall be recorded by Contractor and such seals shall be broken only by authorized representatives of Contractor. Should any seal so attached to equipment under the terms hereof become broken or be tampered with in an unauthorized manner, Contractor shall immediately report such circumstances to the nearest Army Air Forces Inspector and to the Property Officer, Fuels and Lubricants Branch, Air Service Command, Patterson Field, Fairfield, Ohio, and no fuel shall be loaded into or removed from such facilities

until inspection and approval of the contents thereof has been accomplished by the Army Air Forces Inspector in charge.

[fol. 841] Article 25—Renegotiation pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended.

(a) Upon the written demand of the Secretary, at such period or periods when, in the judgment of the Secretary, the profits accruing to the Contractor under this contract can be determined with reasonable certainty, the contract price will be renegotiated to eliminate therefrom any amount found as a result of such renegotiation to represent excessive profits. The demand of the Secretary shall fix a place for renegotiation and a time for commencement thereof not later than one year after the close of the fiscal year of the Contractor within which completion or termination of this contract, as determined by the Secretary, occurs.

(b) The Contractor will furnish to the Secretary such statements of actual costs of production and such other financial statements, at such times and in such form and detail, as the Secretary may prescribe, and will permit such audits and inspections of its books and records as the Secretary may request.

(c) The Government shall retain from amounts otherwise due the Contractor, or the Contractor shall repay to the Government if paid to him, any amount of the contract price found as a result of such renegotiation to represent excessive profits and not eliminated through reductions in contract price or otherwise, as the Secretary may direct.

(d) The Contractor will include in each subcontract made by it under this contract for an amount in excess of $100,000, the following provisions:

"Article —.—Renegotiation pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended.

(1) Upon the written demand of the Secretary, at such period or periods when, in the judgment of the Secretary, the profits accruing to ——— (Subcontractor) under this contract can be determined with reasonable certainty, the

Secretary and ——— (Subcontractor), will renegotiate the contract price to eliminate therefrom any amount found as a result of such renegotiation to represent excessive profits. The demand of the Secretary shall fix a place for renegotiation and a time for the commencement thereof not later than one year after the close of the fiscal year of the subcontractor within which completion or termination of this contract, as determined by the Secretary, occurs.

(2) ——— (Subcontractor) will furnish to the Secretary such statements of actual costs of production and such other financial statements, at such times and in such form and detail, as the Secretary may prescribe, and will permit such audits and inspections of its books and records as the Secretary may request.

(3) Any amount of the contract price found as a result of such renegotiation to represent excessive profits shall, as directed by the Secretary,—

[fol. 842] (A) Be deducted by ——— (Contractor) from payments otherwise due to ——— (Subcontractor) under this contract; or

(B) Be paid by ——— (Subcontractor) directly to the Government, if paid to him; or

(C) Be eliminated through reductions in the contract price or otherwise.

(4) ——— (Subcontractor) Agrees that ——— (Contractor) shall not be liable to ——— (Subcontractor) for or on account of any amount paid to the Government by ——— (Subcontractor) or deducted by ——— (Contractor) from payments otherwise due under this contract, pursuant to directions from the Secretary in accordance with the provisions of this Article. Under its contract with the Government, ——— (Contractor) is obligated to pay or credit to the Government all amounts withheld by it from ——— (Subcontractor hereunder.

(5) ——— (Subcontractor) agrees (a) upon direction of the Secretary, to include in any subcontract hereunder sections (1) to (6) inclusive of this Article, and (b) to make no subdivisions of any contract or subcontract for the purpose of evading the provisions of this section, and (c) to repay to the Government the amount of any reduction in

the contract price of any such subcontract which results from renegotiation thereof by the Secretary, and which the Secretary directs ——— (Subcontractor) to withhold from payments otherwise due under such subcontract and actually unpaid at the time ——— (Subcontractor) receives such direction.

(6) As used in this Article,—

(a) The term 'Secretary' means the Secretary of War or any duly authorized representative of the Secretary, including the Contracting Officer.

(b) The term 'subcontract' means any purchase order or agreement to perform all or any part of the work, or to make or furnish any material, part, assembly, machinery, equipment or other personal property, required for the performance of this contract, unless exempt under or exempted pursuant to Section 403 (i) of the Sixth Supplemental National Defense Appropriation Act of 1942 as amended by Section 801 of the Revenue Act of 1942.

(c) The terms 'renegotiate' and 'renegotiation' have the same meaning as in section 403 (b) of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended.

[fol. 843] (d) The term 'this contract' means this contract as modified from time to time."

(e) (1) The Contractor agrees to make no subdivisions of any contract or subcontract for the purpose of evading the provisions of this Article.

(2) If any renegotiation between the Secretary and any subcontractor pursuant to the provisions required by section (d) hereof results in a reduction of the contract price or fixed-fee of the subcontract, the Government shall retain from payments otherwise due to the Contractor, or the Contractor shall repay to the Government, as the Secretary may direct, the amount of such reduction which the Secretary directs the Contractor to withhold from payments otherwise due to the subcontractor under the subcontract and actually unpaid at the time the Contractor receives such direction.

(f) If the Contractor makes any subcontract under this contract upon a fixed-fee basis, (i) for determining the application of section (d) the amount of said subcontract

shall be deemed to be the estimated cost thereof plus the fixed-fee and (ii) there shall be substituted in paragraphs (1) and (3) of the Article to be inserted therein pursuant to section (d) the words "fixed-fee specified in Article —" for the words "contract price".

(g) As used in this Article:

(1) The term "Secretary" means the Secretary of War or any duly authorized representative of the Secretary, including the Contracting Officer.

(2) The term "subcontract" means any purchase order or agreement to perform all or any part of the work, or to make or furnish any material, part, assembly, machinery, equipment or other personal property, required for the performance of this contract, unless exempt under or exempted pursuant to Section 403 (i) of the Sixth Supplemental National Defense Appropriation Act of 1942 as amended by Section 801 of the Revenue Act of 1942.

(3) The terms "renegotiate" and "renegotiation" have the same meaning as in section 403 (b) of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended.

(4) The term "this contract" means this contract as modified from time to time.

(h) If any joint regulation issued pursuant to subsection (i)(1)(ii) of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, defines, interprets, or applies that subsection (i)(1)(ii) to exempt from the provisions of said Section 403, as amended, contracts for any product or products covered by this contract, then the contract price for such product or products, if separately stated herein, shall not be subject to renegotiation under this Article.

Article 26—Approval

This contract shall be subject to the written approval of the Secretary of War or such individual as said Secretary may designate and shall not be binding until so approved.

Cameraman's Note:

This is poor copy, but is the best obtainable.

Exhibit "A" to Contract W 535 ac-36457 [redacted]

Item No.	Destination	Terminal or Bulk Depot	Octane Grade	Gallons Estimated To Be Handled	Type of Delivery	Service Price Per Gallon F.O.B. Plane	F.O.B. Terminal or Bulk Depot	F.O.B. Government Storage
[redacted]	[redacted]	Memphis, Tennessee	100	400,000	F.O.B. Terminal or Bulk Depot into Tank Car or Tank Truck		a. $0.003 b. $0.0069	
[redacted]	[redacted]	Nashville, Tennessee	100	200,000	In Tank Truck F.O.B. Government Storage or F.O.B. Terminal or Bulk Depot		a. $0.0080 b. $0.0119	a. $0.0122 b. $0.0161
[redacted]	[redacted]	[redacted]	91	200,000				
[redacted]	[redacted]	Memphis Tennessee	100	80,000	Into Tank Car or Tank Truck F.O.B. Terminal or Bulk Depot		a. $0.003 b. $0.0069	
[redacted]	[redacted]	[redacted]	100	50,000	In Tank Truck F.O.B. Government Storage or F.O.B. Terminal or Bulk Depot		a. $0.003 b. $0.0069	a. $0.011 b. $0.0149
[redacted]	[redacted]	[redacted]	91	25,000				
[redacted]	[redacted]	[redacted]	100	30,000	Into Tank Car F.O.B. Terminal or Bulk Depot		a. $0.003 b. $0.0069	

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Exhibit "A" to Contract W 535 ac-36457 (cont'd)

[illegible]	Terminal or Bulk Depot	Octane Grade	Gallons Estimated To Be Handled	Type of Delivery	F.O.B. Plane	Service Price Per Gallon F.O.B. Terminal or Bulk Depot	Service Price Per Gallon F.O.B. Government Storage
[illegible] Johnson City, Tennessee	Johnson City, Tennessee	100	42,000	F.O.B. Government Plane		$0.0126 Plus Scale	
[illegible] Kingsport, Tennessee	Kingsport, Tennessee	91	42,000				
[illegible] Johnson City, Tennessee	Johnson City, Tennessee	Contractor-Furnished Aircraft Engine Oil Army-Navy Aeronautical Specification AN-VV-O-446 Dated December 15, 1941, hereby made a part hereof. Grade 1120	1,500	F.O.B. Government Plane		$0.80	
[illegible] Knoxville, Tennessee	Knoxville, Tennessee	100	80,000	F.O.B. Government Plane	a.	$0.0256	Includes $0.01 Service Fee to City
[illegible] Knoxville, Tennessee	Knoxville, Tennessee	91	40,000		b.	$0.0295 Plus Scale	
[illegible] Knoxville, Tennessee	Knoxville, Tennessee	Contractor-Furnished Aircraft Engine Oil Army-Navy Aeronautical Specification	1,500	F.O.B. Government Plane		$0.80	

Cameraman's Note:

This is poor copy, but is the best obtainable.

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Exhibit "A" to Contract 535 ac-36457 (cont'd)

Item No.	Destination	Terminal or Bulk Depot	Octane Grade	Gallons Estimated To Be Handled	Type of Delivery	Service Price Per Gallon: F.O.B. Plane	F.O.B. Terminal or Bulk Depot	F.O.B. Government Storage
			AN-VV 0 446 dated December 15, 1941, hereby made a part hereof. Grade 1120					
	Memphis Tennessee	Memphis, Tennessee	100	3,646,000	F.O.B. Government Planes	a. 0.0106 b. 0.0145 Plus Scale		
15.	Memphis, Tennessee	Memphis, Tennessee	91	743,400	F.O.B. Government Planes			
16.	Memphis, Tennessee	Memphis, Tennessee	100 or 91	(Gallonage included in Item above)	F.O.B. Crash Boats at Standard Oil Company of Louisiana Pier	a. 0.0306 b. 0.0345 Plus Scale		
17.	Memphis, Tennessee	Memphis, Tennessee	Contractor-Furnished Aircraft Engine Oil Army-Navy Aeronautical Specification AN-VV-0-446 dated December 15, 1941, hereby made a part hereof. Grade 1120.	88,000	F.O.B. Government Plane	0.80		

Cameraman's Note:

This is poor copy, but is the best obtainable.

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Exhibit "A" to Contract 53[illegible] sc-36457 (cont'd)

Item No.	Destination	Terminal or Bulk Depot	Octane Grade	Gallons Estimated	Type of Delivery	F.O.B.	Service Charge Per Gallon
18	Milfo[illegible] Tennessee	Nashville Terminal	91				
19	Nashville, Tennessee	Nashville Tennessee	100	1,3[illegible]			
20	Nashville, Tennessee	Nashville Tennessee	91	59,000	F.O.B. Terminal or Bulk Depot Into Government storage Units or F.O.B. Government storage	a. $0.005 b. $0.0139	a. $0.022 b. $0.0161
21 —	New Orleans, Louisiana	New Orleans, Louisiana	100	1,000,000			
22	New Orleans, Louisiana	New Orleans, Louisiana	91	88,000	F.O.B. Government Storage or F.O.B. Terminal or Bulk Depot	a. $0.005 b. $0.006	a. $0.0094 b. $0.0104
23	Symrna, Tennessee	Nashville or Memphis, Tennessee	100	3,115,000	In Tank Truck F.O.B. Government storage or F.O.B. Terminal or Bulk Depot into Tank car - Tank Truck	a. $0.008 b. $0.0119	a. $0.0122 b. $0.0161
24	Tullahoma, Tennessee	Nashville, Tennessee	100	685,000			
25	Tullahoma, Tennessee	Nashville, Tennessee	91	160,000	In Tank Truck F.O.B. Government storage or F.O.B Terminal or Bulk Depot	a. $0.008 b. $0:0119	a. $0.0160 b. $0.0199

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Cameraman's Note:

This is poor copy, but is the best obtainable.

S N & D

Exhibit "A" to Contract [illegible] 53[illegible] ac-36[illegible]57 (cont'd)

Item No.	Destination	Terminal or Bulk Depot	Octane Grade	Gallons Estimated To Be Handled	Type of Delivery	Service [illegible] per gallon: F.O.B. Plant	F.O.B. Terminal or Bulk Depot	[illegible]
26.	Walnut Ridge, Arkansas	Memphis, Tennessee	100	[illegible]0,000	F.O.B. Terminal or Bulk Depot Into Tank Car or Tank Truck		a [illegible]0.00[illegible] b [illegible]0.0069	
27.	Harding Field, Baton Rouge, Louisiana	Contractor's Refinery Baton Rouge	100 or 91	1,200,[illegible]	In Tank Trucks F.O.B. Government Storage			[illegible]0.0074
[illegible]	Army Air Forces Stations As required	Direct from Standard Oil Company of Louisiana Refineries	100	5,000,000	F.O.B. Refinery Into Tank Car		F.O.B. Refinery Into Tank Car [illegible]0.001	

1. The words "plus scale" as used in the service prices for deliveries at Adamsfield, Arkansas and Johnson City, Knoxville and Memphis, Tennessee indicate that the prices so designated shall be in accordance with the following scale plus the applicable per gallon price set forth in the exhibit.

Scale

0 - 24,999 gallons per month	[illegible] per gallon
25,000 - 49,999 gallons per month	0.035 per gallon
50,000 - 74,999 gallons per month	0.03 per gallon
75,000 - 99,999 gallons per month	0.025 per gallon
100,000 or over per month	0.02 per gallon

Cameraman's Note:

This is poor copy, but is the best obtainable.

2. The designations "a." and "b." as used below the service prices in the foregoing Exhibit indicate the following:

"a." - Service price per gallon when fuel is received by the Contractor at the terminal or bulk depot, transportation being Government paid.

"b." Service price per gallon when fuel is transported to terminal or bulk depot by Contractor-paid transportation. Such price includes transportation rates as follows:

Baton Rouge to Memphis . . . . . $2.0039 per gallon

Baton Rouge to New Orleans . . . . . .00.001 per gallon

3. The service price indicated in the foregoing Exhibit for shipments from Standard Oil Company of Louisiana delivered to Army Air Forces Stations includes such reports as may be required by the Contracting Officer, also services in receiving and executing such shipping instructions as may be issued by the Contracting Officer and such other services in inspecting materials and tracing shipments as may be incident to tank car unloading plants or as may be required by the Contracting Officer.

4. In the event of a change in applicable freight or water rates as published by the Interstate Commerce Commission, service rates as stated in this Exhibit in which Contractor-paid transportation is involved, will, subject to the approval of the Contracting Officer, be reduced or increased by a similar increase or decrease of the actual amount of such increase or decrease.

5. Articles 1 to 4 inclusive, of this contract shall be binding upon the parties hereto to the extent that the provisions and requirements thereof are applicable to the types of services specified at the points indicated in this Exhibit.

6. If any action taken by the Office of Price Administration during the term of this contract imposes a maximum price for any of the services called for hereunder below the price for such services provided for hereby, the Contractor shall reduce the price for such service performed prior thereto, and may, if it so elects be released from the obligation to render further services so affected by such maximum price regulation, in which event that portion of this contract shall be deemed to have been terminated under the provisions of Article 16 hereof. Such election by the Contractor shall be evidenced by a written notice to the Contracting Officer delivered within fifteen (15) days after the effective date of such action taken by the Office of Price Administration. Unless such notice is delivered within such time, the Contractor shall be obligated to perform such services for such maximum price.

Cameraman's Note:

This is poor copy, but is the best obtainable.

S H & D

Exhibit "A" to Contract W 535 ac-36457 (cont'd)

7. As of the date of execution of this contract there has been allotted for it the total sum of $385,805.44. This sum may be increased from time to time by the Government solely in its discretion. Upon the making of any such increase the Contracting Officer shall notify the Contractor in writing of the amount of such increase. Anything in this contract to the contrary notwithstanding, the Government shall not be obligated to pay to the Contractor any amount in excess of said sum allotted for this contract; provided, however, that if the Contractor performs services of the type called for in this contract for which funds are not allotted, the Contracting Officer may ratify such services when funds are allotted therefor.

Cameraman's Note:

This is poor copy, but
is the best obtainable.

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[illegible]

CERTIFICATE

AIRCRAFT ENGINE FUEL

The Undersigned Company hereby certifies that the shipment of

FUEL, AIRCRAFT ENGINE, SPECIFICATION NO._____, AMEND. NO.___ GRADE NO.___

TO _____
(Consignee) (Location)

FROM _____ ON _____
(Shipping Point) (A.F Contract or Order No.)

ON _____ IN _____, is identified in detail as follows:
(Date Shipped) (Type of Container)

IDENTIFYING NUMBERS OF CONTAINERS	SERIAL NUMBERS OF SEALS (If Applicable)	BILL OF LADING NO.	QUANTITY GAL. AT 60° F.

The Undersigned Company further certifies that the aircraft engine fuel delivered, as described above, was taken from a stock composed only of products which had been previously analyzed and found to satisfy the requirements of the applicable specification; also that all material in the above stock, if received from another point, was received in properly sealed and inspected tank cars or other type vessels.

_____
(Name of Company)

APPROVED _____ _____
Army Air Forces Inspector (Authorized Signature)

OR

Subscribed and sworn to before me this _____ day of _____

(SEAL)

_____
(Notary Public)

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Cameraman's Note:

This is poor copy, but is the best obtainable.

Cameraman's Note:

This is poor copy, but is the best obtainable.

S H A D

IN WITNESS WHEREOF, the parties hereto have executed this contract as of the day and year first above written.

THE UNITED STATES OF AMERICA

By: [signature]

RICHARD M. LEUTKINGER, Captain, Air Corps

Contracting Officer
Official Title

TWO WITNESSES:

[signature]
W. F. QUICK, ASST. SECRETARY

[signature]
L. T. HODGES

NOTE: Type or print names under all signatures.

STANDARD OIL COMPANY OF LOUISIANA

BY: [signature]
WEIR R. GOODWIN

New York, New York
Business Address

I, W. F. QUICK, certify that I am the ASST. Secretary of the corporation named as Contractor herein; that WEIR R. GOODWIN who signed this contract on behalf of the Contractor, was then DIRECTOR of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

[signature]
W. F. QUICK (Corporate Seal)

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, , who signed this Contract for STANDARD OIL COMPANY OF LOUISIANA, had authority to execute the same, and is the individual who signs similar contracts on behalf of this corporation with the public generally.

Contracting Officer

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File
AO
5-12-43
P

Supplemental Agreement No. [illegible]
to Contract W 535 ac [illegible]

AMMB Preference None

Classification 06-A

APP 985877 A

I. O. M.

SUPPLEMENTAL AGREEMENT
TO
FIXED PRICE
CONTRACT

for

SERVICES

(ARMY AIR FORCES)

WAR DEPARTMENT
Office

Cameraman's Note:

This is poor copy, but is the best obtainable.

CONTRACTOR: STANDARD OIL COMPANY OF LOUISIANA

SUPPLEMENTAL AGREEMENT FOR: Transportation Services in connection with the delivery of certain Grade 91 Aircraft Engine Fuel from Nashville to Memphis, Tennessee

CHANGE IN PRICE: Increase - Not to exceed $378.87

Payments to be made by the Finance Officer, United States Army, Court Square Building, 2 Lafayette Street, New York 7, New York.

The supplies and services, if any, to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the allotments below enumerated under the heading "Debit", the available balances of which are sufficient to cover the cost thereof. The reduction, if any, in price under this instrument will result in credits to the allotments below enumerated under the heading "Credit".

Debit

ACA 1942-44, 2-4085 P 412-07 A 212/40705

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Cameraman's Note:

This is poor copy, but is the best obtainable.

SUPPLEMENTAL AGREEMENT TO
FIXED PRICE CONTRACT FOR SERVICES

THIS SUPPLEMENTAL AGREEMENT No. 6 (S-4828) to Contract No. W 535 ac-38457, entered into this 26th day of April, 1944, by and between THE UNITED STATES OF AMERICA, hereinafter called the "Government", represented by the Contracting Officer executing this Supplemental Agreement*, and STANDARD OIL COMPANY OF LOUISIANA, a corporation organized and existing under the laws of the State of Louisiana, of the City of New York, in the State of New York, hereinafter called the "Contractor",

W I T N E S S E T H

WHEREAS, the Government and the Contractor have heretofore entered into Contract No. W 535 ac-38457, which contract, as the same may have been heretofore amended, modified and supplemented, is hereinafter called the "Service Contract" and pursuant to which the Contractor has agreed to furnish to the Government certain services in connection with the storage, handling and transportation of Government-owned aircraft engine fuel;

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements herein contained and for other good and valuable considerations, the parties hereto agree as follows:

First: The Service Contract is hereby amended and supplemented by adding thereto Exhibit "A-1", attached hereto and hereby made a part hereof. Wherever the phrase "Exhibit 'A'" is used in the Service Contract, it shall be deemed to include "Exhibit 'A-1'". Paragraphs 3 to 7, inclusive, of Exhibit "A" shall likewise be applicable to Exhibit "A-1".

Second: Paragraph 7 of Exhibit "A" to the Service Contract is hereby amended by deleting the first (1st) sentence thereof and substituting in lieu thereof the following sentence:

"As of the date of execution of Supplemental Agreement No. 6 to this contract there has been allotted for the contract the total sum of $626,184.31."

Third: Article 12 - Anti-Discrimination - of the Service Contract is hereby amended as follows:

(a) By deleting from the second (2nd) line of paragraph (a) of said Article the word "worker" and substituting in lieu thereof the words "employee or applicant for employment".

(b) The amendment made by this Section Third shall be effective as of the date of approval of this Supplemental Agreement No. 6 and shall not be

* This Supplemental Agreement was negotiated under the authority of the First War Powers Act, 1941, and Executive Order No. 9001, 27 December 1941.

[redacted]

Cameraman's Note:

This is poor copy, but is the best obtainable.

Cameraman's Note:

This is poor copy, but is the best obtainable.

Exhibit "A-1" to Contract W-[redacted]

1. The Contractor shall [redacted] portation of not to exceed 19,836 gallons [redacted] aircraft engine fuel from Contractor's terminal [redacted] Tennessee, to Contractor's bulk plant located at [redacted] at the unit price of $0.0191 per gallon, and at the total [redacted] services of not to exceed . . . . . .

2. The word "fuel" as used in Article 1 and Article 3 of Exhibit "A" of the contract shall be deemed to include the Contractor-owned fuel referred to in this Exhibit "A-1", provided, however, that the reports under paragraphs (a) (6) and (a) (7) of Article 1 are not applicable to Contractor-owned fuel.

3. The Government recognizes that the Contractor, at the Government's request and for the purpose of facilitating the prosecution of the War, has performed the services set forth in this Exhibit "A-1" during the period beginning on January 1, 1943, and ending at midnight, June 30, 1943, and it is accordingly agreed that all the terms of the Service Contract shall apply to such performance as though this Supplemental Agreement had been in effect prior to such performance.

IN WITNESS WHEREOF, the parties hereto have executed this Supplemental Agreement as of the day and year first above written.

THE UNITED STATES OF AMERICA

By Dean Sweeney
DEAN SWEENEY, 1st Lt., Air Corps

Contracting Officer
(Official Title)

Two witnesses:

ATTEST: W. F. Quick
W. F. QUICK, ASST. SECRETARY

STANDARD OIL COMPANY OF LOUISIANA
(Contractor)

By Weir R. Goodwin
WEIR R. GOODWIN

DIRECTOR

NOTE: Type or print names under all signatures.

New York, New York
(Business Address)

I, W. F. QUICK, certify that I am the ASST. Secretary of the corporation named as Contractor herein; that WEIR R. GOODWIN who signed this Supplemental Agreement on behalf of the Contractor, was then DIRECTOR of said corporation; that said Supplemental Agreement was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

W. F. Quick (Corporate Seal)
W. F. QUICK

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry,

the signed this Supplemental Agreement for STANDARD OIL COMPANY OF LOUISIANA, had authority to execute the same, and is the individual who signs similar agreements on behalf of this corporation with the public generally.

(Contracting Officer)

437

3

Supplemental Agreement No. 7 (S-7599)
to Contract W 535 ac-36457 (9729)

ANMB Preference None

Classification 06-A

AFP None

I. O. M. 1st Indorsement, Production Section, dated 25 Sept. 1944

SUPPLEMENTAL AGREEMENT
TO
FIXED PRICE
CONTRACT

for

SERVICES

(ARMY AIR FORCES)

AR DEPARTMENT
GST:ske

CONTRACTOR: STANDARD OIL COMPANY OF LOUISIANA

SUPPLEMENTAL AGREEMENT FOR: Extension of the Contract Period Affecting Item 22 of Exhibit "A"

CHANGE IN PRICE: None

Payments to be made by the Finance Officer, United States Army, Court Square Building, 2 Lafayette Street, New York 7, New York.

The supplies and services, if any, to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the allotments below enumerated under the heading "Debit", the available balances of which are sufficient to cover the cost thereof. The reduction, if any, in price under this instrument will result in credits to the allotments below enumerated under the heading "Credit".

	R. C. O.	R. C. W.	
✓	F. A. B.	J. L.	
	H. F. P.	E. F.	
	J. McD.	E. L. R.	

SALES AVIATION

FILE FOLDER

9/23/43

858

438

SUPPLEMENTAL AGREEMENT TO FIXED PRICE CONTRACT FOR SERVICES

THIS SUPPLEMENTAL AGREEMENT No. 7 (S-7999) to Contract No. W 535 ac-36457, entered into this 14th day of October, 1944, by and between THE UNITED STATES OF AMERICA, hereinafter called the "Government", represented by the Contracting Officer executing this Supplemental Agreement*, and STANDARD OIL COMPANY OF LOUISIANA, a corporation organized and existing under the laws of the State of Louisiana, of the City of New York, in the State of New York, hereinafter called the "Contractor",

W I T N E S S E T H

WHEREAS, the Government and the Contractor have heretofore entered into Contract No. W 535 ac-36457, which contract, as the same may have been heretofore amended, modified and supplemented, is hereinafter called the "Service Contract" and pursuant to which the Contractor has agreed to furnish to the Government certain services in connection with the storage, handling and transportation of Government-owned aircraft engine fuel, and certain services in connection with the transportation of Contractor-owned aircraft engine fuel;

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements herein contained and for other good and valuable considerations, the parties hereto agree as follows:

First: Article 1 - Scope of this Contract - of the Service Contract is hereby amended by deleting the first eight (8) lines of paragraph (a) of said article and substituting the following in lieu thereof:

"(a) The Contractor shall furnish and supply to the Government storage and handling facilities at the points indicated in Exhibit "A" which is hereto attached and hereby made a part hereof, and shall render services in connection therewith as hereinafter more particularly described in receiving, storing, handling, loading, shipping, and delivering Government-owned fuel (the word "fuel" as used hereinafter shall mean Government-owned fuel unless otherwise specified) at the unit prices indicated in said Exhibit "A". The Contractor shall also perform certain services in connection with the transportation of Contractor-owned fuel as set forth in Exhibit "A-1" to this Contract. Said services shall be performed when and as the Government shall request and direct the Contractor to supply the same during the periods indicated below:

Services Called For Under Exhibit "A":

Items 1 to 20 inclusive and 23 to 28 inclusive during the period beginning January 1, 1943,

* This Supplemental Agreement was negotiated under the authority of the First War Powers Act, 1941, and Executive Order No. 9001, 27 December 1941.

and ending on December 31, 1943.

Item 21 during the period beginning January 1, 1943, and ending on February 15, 1944.

Item 22 during the period beginning January 1, 1943, and ending on July 31, 1944.

The services called for under the terms of Change Order No. 2 (C-16178) during the period beginning January 1, 1943, and ending on December 31, 1943.

Services Called For Under Exhibit "A-1":

During the period beginning January 1, 1943, and ending on June 30, 1943.

Said services shall be performed by the Contractor in accordance with the following stipulations and conditions:"

Second: The Government recognizes that the Contractor, at the Government's request and for the purpose of facilitating the prosecution of the War, has performed certain services under Item 22 of Exhibit "A" to this contract during the extension of the period provided for by this Supplemental Agreement, and it is accordingly agreed that all the terms of the Service Contract shall apply to such performance as though this Supplemental Agreement had been in effect prior to such performance.

Third: Except as hereby modified, either expressly or by necessary implication, all the terms, covenants and conditions of the Service Contract shall continue in full force and effect.

IN WITNESS WHEREOF, the parties hereto have executed this Supplemental Agreement as of the day and year first above written.

THE UNITED STATES OF AMERICA

BY: Dean Sweeney

DEAN SWEENEY, Captain, Air Corps
Contracting Officer
(Official Title)

ATTEST

W. R. CHUCK

STANDARD OIL COMPANY OF LOUISIANA
(Contractor)

BY: Weir R. Goodwin

WEIR R. GOODWIN
26 Broadway,
New York, New York
(Business Address)

NOTE: Type or print names under all signatures

I, certify that I am the Secretary of the corporation named as Contractor herein; that who signed this Supplemental Agreement on behalf of the Contractor, was then of said corporation; that said Supplemental Agreement was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

Corporate Seal

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, , who signed this Supplemental Agreement for STANDARD OIL COMPANY OF LOUISIANA , had authority to execute the same, and is the individual who signs similar agreements on behalf of this corporation with the public generally.

Contracting Officer

Cameraman's Note:

This is poor copy, but
is the best obtainable.

D-1

[illegible] TO USE [illegible] KEROSENE IN ST[illegible] FIRES. THAT ESSO AND ESSO EXTRA [illegible] TO BE USED FOR ILLUMINATING PURPOSES, EXCEPT THAT THE GASOLINE MAY BE USED FOR ILLUMINATING [illegible]

STANDARD OIL COMPANY OF LOUISIANA

MEMPHIS, TENN.
246

[illegible] SUBJECT TO [illegible] WITHOUT NOTICE

NO. 3-1003

DATE 3/30/44

CUSTOMER'S

REQ. N[illegible]

PRO[illegible]

CONTRA[illegible]

DELIVER TO

FINANCE OFFICER
U. S. ARMY
MUTUAL HOME BUILDING
120 WEST SECOND ST.
DAYTON, OHIO

PACKAGES		CONTAINER CODE	PRODUCT CODE	DESCRIPTION OF ARTICLE	GALLONS OR POUNDS
KIND	QUANTITY				

"SERVICE CHARGE ON DELIVERIES OF GOVERNMENT-OWNED AIRCRAFT ENGINE FUEL, PER CONTRACT W-33-038-AC-1683." MONTH OF JANUARY, 1944.

PER DETAILS ATTACHED. 2,498,536 $10,174.11

BASIC CONTRACT PRICE [illegible] BELOW TANK WAGON. THE CON[illegible] TANK WAGON PRICE IN EFFECT ON DATE AND AT PLACE OF DELIVERY WAS POSTED AT [illegible] MAXIMUM [illegible]

TRANSPORTATION COMPANY'S RECEIPT OF GOODS IN [illegible] ORDER CONSTITUTE[illegible] STEEL BARRELS ARE THE PROPERTY OF THE COMPANY AND [illegible] COVERED HEREBY MEETS U. S. MOTOR SPECIFICATIONS.

[illegible] MAKE ALL REMITTANCES TO P. O. BOX 167 [illegible] WHEN SETTLEMENT IS [illegible] BY CHECK, NO RECEIPT WI[illegible] SHIPPED AT BUYER'S RISK OF LEAKAGE [illegible]

COMPLAINANT'S EXHIBIT #36

442

COMPLAINANT'S EXHIBIT #37

[illegible] FIRES, THAT [illegible] AND [illegible] EXTRA MUST NOT BE USED EXCE[illegible] MOTOR FUEL AND THAT THE GASO[illegible] [illegible] EXCEPT THAT THE GASOLINE MAY BE USED FOR ILLUMINATING PURPOSES IN LAMPS AND LANTERNS ESPECIALLY CON[illegible]

STANDARD OIL COMPANY OF LOUISIANA

MEMPHIS, TENNESSEE

[illegible] SUBJECT TO CHANGE WITHOUT NOTICE.
[illegible] THAT THE PRICES STATED HEREIN ARE NOT IN [illegible] PRICES, IF ANY, ESTAB[illegible] TO THE EMERGENCY PRICE CONTROL ACT OF [illegible]

NO. 7-1001

DATE 7-24-44

CUSTOMERS' ORDER

CAR NO.

VIA

DEL'V'D FROM

DEL'V'D TO

[redacted]

SOLD TO

FINANCE OFFICER
U.S. ARMY
MEDICAL HOME BUILDING
120 WEST 2ND STREET
DAYTON, OHIO

PRODUCTS		CONTAINER CODE	PRODUCT CODE	DESCRIPTION OF ARTICLE	GALLONS OR POUNDS	PRICE	ITEM	AMOUNT
[illegible]	QUANTITY							
				SERVICE CHARGE ON DELIVERIES OF GOVERNMENT-OWNED AIRCRAFT ENGINE FUEL, PER CONTRACT [illegible]-AC-1863.				
				DELIVERIES (GRADE 87) FROM MEMPHIS, TENN. TERMINAL, JANUARY 1, 1944 THROUGH JUNE 30, 1944, PER DETAILS ATTACHED.				
				SERVICE CHARGE	6,951,935	$.0018		$12,513.48
				STORAGE TANK RENTAL, MONTH OF JUNE, 1944				450.00
								$12,963.48

[redacted] AT TIME PAYMENT FOR CONTENTS IS DUE. DEPOSITS WILL BE REFUNDED IF CONTAINERS ARE RETURNED [illegible] COMPANY'S RECEIPT OF GOODS IN GOOD ORDER CONSTITUTES DELIVERY AFTER WHICH OUR RESPONSI[illegible]

[illegible] P. O. BOX 567, MEMPHIS 1, TE[illegible]
[illegible] WILL BE GIVEN UNLESS REQUESTED.
[illegible] BUYER'S RISK OF LEAKAGE OR LOSS

863

Cameraman's Note:

This is poor copy, but is the best obtainable.

B-1

[illegible] ESSO EXTRA MUST NOT BE USED [illegible] AS MOTOR FUEL, AND THAT THE GASOLINE [illegible] ARE NOT SOLD TO BE USED FOR ILLUMINATING PURPOSES, EXCEPT THAT THE GASOLINE MAY BE USED FOR ILLUMINATING PURPOSES IN LAMPS AND LANTERNS ESPECIALLY CONSTRUCTED FOR SUCH USE.

STANDARD OIL COMPANY OF LOUISIANA

401

KNOXVILLE, TENN.
246

ALL PRICES SUBJECT TO CHANGE WITHOUT NOTICE

NO. 4-1005

DATE 4/28/44

CUSTOMERS' ORDER

REQ. NO.

PROJECT NO.

CONTRACT NO.

DEL'V'D TO

SOLD TO

FINANCE OFFICER
U. S. ARMY
MUTUAL HOME BUILDING
120 WEST SECOND ST.
DAYTON, OHIO

PACKAGES FIND	PACKAGES QUANTITY	CONTAINER CODE	PRODUCT CODE	DESCRIPTION OF ARTICLE	GALLONS OR POUNDS	PRICE	ITEM	AMOUNT

SERVICE CHARGE ON DELIVERIES OF GOVERNMENT-OWNED AIRCRAFT ENGINE FUEL OIL, PER CONTRACT W-33-038-AC-1669. DELIVERIES FROM KNOXVILLE, TENNESSEE AIRPORT.

PER DETAILS ATTACHED.

JANUARY 1944.	28.344	6.20¢	$1,757.33	
FEBRUARY, 1944.	31,493	6.20¢	1,952.57	
MARCH, 1944	24 819	6.20¢	1,538.78	$5,248.68

BASIC CONTRACT PRICE ¢ BELOW TANK WAGON. THE COMMERCIAL CONSUMERS' PUBLICLY POSTED TANK WAGON PRICE IN EFFECT ON DATE AND AT PLACE OF DELIVERY WAS ¢ PER GALLON. THIS PRICE POSTED AT MAXIMUM CONTRACT PRICE ¢ PER GALLON.

TRANSPORTATION COMPANY'S RECEIPT OF GOODS IN GOOD ORDER CONSTITUTES DELIVERY, AFTER WHICH OUR RESPONSIBILITY CEASES. STEEL BARRELS ARE THE PROPERTY OF THIS COMPANY AND SHOULD BE EMPTIED AND RETURNED TO US AT ONCE. ALL GASOLINE COVERED HEREBY MEETS U. S. MOTOR SPECIFICATIONS.

GEN-MKT; 7-6-2A—BP 4-736

MAKE ALL REMITTANCES TO P. O. BOX 367, MEMPHIS, TENN.
WHEN SETTLEMENT IS MADE BY CHECK, NO RECEIPT WILL BE GIVEN UNLESS REQUESTED
SHIPPED AT BUYER'S RISK OF LEAKAGE OR LOSS

COMPLAINANT'S EXHIBIT #38

COMPLAINANT'S EXHIBIT #39

NOTICE	MONTHLY GASOLINE TAX AND INSPECTION FEE REPORT To STATE OF TENNESSEE DEPARTMENT OF FINANCE AND TAXATION NASHVILLE, TENNESSEE	NOTICE
This Report Must Be Filed and Gasoline Tax and Inspection Fees Paid on or Before the 20th Day of Each Month.	Month of JANUARY 1944	All Supporting Schedules Must Be Attached Hereto

Name of Taxpayer STANDARD OIL COMPANY OF LOUISIANA

Street Address 1211 Union Avenue

City and State Memphis, Tennessee County SHELBY

Complt's Ex. #39 4-13-40

SUMMARY OF RECEIPTS AND INVENTORY		Gasoline Gallons	Barrels All Substances
1. Gasoline Inventory at Beginning of Month		10,381,672.5	
2. Total Receipts by Tank Cars (from Schedule A)	154,360		12,086
3. Total Receipts by Vessels and Barges (from Schedule B)	3,964,622		119,942
4. Total Receipts by Tank Trucks & Tank Wagons (from Sched. C)			
5. Total Receipts by Pipeline (from Schedule D)	11,547,872		251,745
6. Total Receipts (Lines 2, 3, 4, and 5)		15,666,854	383,773
7. Total Receipts of Tax-paid Gasoline		646,646	
8. Total Inventory and Receipts		26,695,172.5	
CREDITS:			
9. Sales (Net)		12,630,930	
10. Gasoline Used in Own Operations		39,251	
11. Inventory Adjustment (Show in Red if Debit)		136,412.5	
12. Gasoline Gallons Exported (Gross—From Line 4 of AG-2)		2,672,422	
13. Gasoline Inventory at Close of Month		11,488,982	
14. Total Credits		26,695,172.5	

RECEIVED FEB 1944 TENNESSEE DEPARTMENT OF FINANCE AND TAXATION

COMPUTATION OF TAX AND INSPECTION FEES			
15. Gross Gallons and Barrels Received (From Line 6)		15,666,854	383,773
16. Less: Gross Gasoline Gallons Exported (From Line 4 of AG-2) / Gross Barrels All Substances Exported (From Line 9 of AG-2)		2,672,422	72,006
17. Gallons Gasoline and Barrels All Substances After Deduction		12,994,432	311,767
18. Less Sales to U. S. Government (Prior to July 16, 1942)			
19. Less: (Allowances on Schedules A, B, C, and D Minus Line 5 of AG-2)		113,783	Amount
20. Net Gallons Taxable @ 7c Per Gallon		12,880,649	$901,645.43
21. Total Inspection: After Deducting Quantity Exported @ 20c Per Barrel	$ 62,353.40 (From Line 17 of AG-1)	Total Inspection	64,153.55
On Quantity Exported @ 1/20 Cent Per Gallon	$ 1,800.15 (From Line 10 of AG-2)		
22. Total Tax and Inspection Fees—Check Attached			$965,7[illegible].98

OATH OF TAXPAYER

State of TENNESSEE
County of SHELBY
AFFIDAVIT E 653

Affiant makes oath that the foregoing report and all statements, schedules, and other data attached hereto are true, of his own knowledge; and that all Gasoline Taxes and Inspection Fees due the State of Tennessee for the period mentioned above have been included herein.

S. Klingger Office Manager (Seal)

STANDARD OIL COMPANY OF LOUISIANA (Seal)

Subscribed and sworn to before me, a NOTARY PUBLIC in and for the State and County aforesaid, this 18th day of FEBRUARY 1944

MY COMMISSION EXPIRES APRIL 15, 1945

Chas C Handly

Cameraman's Note:

This is poor copy, but is the best obtainable.

Cameraman's Note:

This is poor copy, but is the best obtainable.

To:
State of Tennessee
Department of Finance and Taxation
Nashville, Tennessee

SCHEDULE A

RECEIPTS BY TANK CARS

SHEET NO. 6

This Schedule is part of Gasoline Tax and Inspection Fee Report and must be attached to Form AG 1.

Name of Taxpayer Standard Oil Co. of Louisiana

Month of January 1944

Date	Office or Stock Transfer Number	Name of Shipper	Point of Origin	Consignee	Destination	Car Initial	Car Number	Commodity	Gallons Non-Taxable Substances	Gallons Taxable Substances	Number Barrels
26		Standard Oil Co. of Ky	Bayway N.J.	Firestone Tire & Rubber Co	Memphis, Tenn	U.T.L.X	15766	Naphtha		6,521	131
10	" 64	Standard Oil Co. of La	Baton Rouge, La	Central Laboratories	"	"	59276	"		4,105	83
10	" 64	" "	" "	" "	" "	"	"	Varsol	2,123		43
30	" 181	" "	" "	" "	" "	"	3000	"	2,190		44
30	" 181	" "	" "	" "	" "	"	"	Naphtha		4,370	88
8	" 44	" "	" "	Blue Ridge Glass Corp	Kingsport	"	38078	Fuel Oil	10,090		202
15	" 101	" "	" "	Knoxville Iron Co	Knoxville	"	14497	"	6,462		130
20	" 133	" "	" "	American Zinc Co	Mascot	"	15395	"	6,481		130
5	" 16	" "	" "	American Bemberg Co	Port Raven	"	5375	"	9,923		199
10	" 58	" "	" "	" "	" "	"	35566	"	10,100		202
15	" 103	" "	" "	" "	" "	C.O.S.X	1591	"	10,005		201
5	" 22	" "	" "	Cavalier Corp	Chattanooga	U.T.L.X	15590	Heating Oil	6,419		129
11	" 73	" "	" "	" "	" "	"	9094	"	6,515		131
18	" 126	" "	" "	" "	" "	"	59878	"	6,520		131
26	" 159	" "	" "	" "	" "	"	59316	"	6,191		124
1	T.S 1	" "	" "	Standard Oil Co. of La	Tyner	"	36085	Varsol	10,203		205
1	" 2	" "	" "	" "	Warren	"	16173	"	6,496		130
2	" 3	" "	" "	" "	Tyner	"	33071	Fuel Oil	10,181		204
4	" 4	" "	" "	" "	" "	"	27597	"	9,987		200
4	" 4	" "	" "	" "	" "	"	32762	"	9,937		199
4	" 4	" "	" "	" "	" "	"	5447	"	10,001		201
4	" 6	" "	" "	" "	Warren	"	18524	Industrial Naphtha	~~[illegible]~~	6,499	130
6	" 10	" "	" "	W. W. Thompson	Selmer	"	15248	Fuel Oil	6,474		130
6	" 11	" "	" "	Standard Oil Co. of La	Warren	"	48478	Avia Gas		12,369	248
7	" 14	" "	" "	" "	Kingsport	"	7942	"		6,575	132
8	" 15	" "	" "	" "	Tyner	"	38150	Fuel Oil	10,070		202
10	" 19	" "	" "	" "	" "	"	29844	"	10,099		202
13	" 24	" "	" "	" "	Memphis	"	3651	Naphtha		6,600	132

TOTAL GROSS GALLONS AND TOTAL BARRELS CARRY FORWARD TO LINE 2 OF AG 1: [illegible] 3/20

TO OF TAXABLE COLUMN CARRY FORWARD TO LINE 1 OF AG 3: [illegible] 3/20

866

445

Form AG 1-A (Rev. 5-1-43)

To:
State of Tennessee
Department of Finance and Taxation
Nashville, Tennessee

SCHEDULE A

RECEIPTS BY TANK CARS

SHEET NO. 2

This Schedule is part of Gasoline Tax and Inspection Fee Report and must be attached to Form AG 1.

Name of Taxpayer Standard Oil Co. of Louisiana

Month of January 1944

Date	Invoice or Stock Transfer Number	Name of Shipper	Point of Origin	Consignee	Destination	Car Initial	Car Number	Commodity	Gallons Non-Taxable Substances	Gallons Taxable Substances	Number Barrels
14	T.S. 26	Standard Oil Co. of La	Baton Rouge, La	Standard Oil Co. La	Tyner, Tenn.	U.T.L.X	35015	Fuel Oil	10058		202.
14	" 26	" "	" "	" "	" "	"	27719	"	10117		203.
14	" 27	" "	" "	" "	Warcer "	"	11406	Gasoline		6524	131.
18	" 32	" "	" "	" "	" "	"	9161	Varsol	6545		131.
18	" 33	" "	" "	" "	Jackson "	"	76442	Avia. Gas		8079	162.
20	" 41	" "	" "	" "	Warcer "	"	70306	Fuel Oil	9940		199.
20	" 42	" "	" "	" "	Johnson City "	"	12596	Varsol	6501		131.
20	" 43	" "	" "	" "	Tullahoma "	NATX	5549	"	8049		161.
20	" 44	" "	" "	" "	Kingsport "	PSPX	730	Gasoline		8080	162.
21	" 46	" "	" "	" "	Warcer "	UTLX	71808	Fuel Oil	7914		159.
21	" 47	" "	" "	" "	" "	"	3083	Gasoline		6631	133.
21	" 48	" "	" "	" "	Tyner "	"	12504	"		6536	131.
22	" 51	" "	" "	" "	Warcer "	"	6067	Fuel Oil	9999		200.
22	" 52	" "	" "	" "	Tyner "	"	38078	"	9927		199.
22	" 53	" "	" "	" "	Warcer "	"	11347	Varsol	6506		131.
23	" 56	" "	" "	" "	Tyner "	"	35578	Fuel Oil	9909		199.
23	" 57	" "	" "	" "	Warcer "	"	27482	"	9944		199.
23	" 58	" "	" "	" "	Tyner "	"	36810	Varsol	10,199		204.
24	" 59	" "	" "	" "	" "	"	36473	Fuel Oil	9868		198.
25	" 60	" "	" "	" "	Warcer "	"	27373	"	10,134		203.
25	" 60	" "	" "	" "	" "	"	70803	"	9954		200.
25	" 60	" "	" "	" "	" "	"	34660	"	10,087		202.
25	" 60	" "	" "	" "	" "	"	29238	"	10,063		202.
25	" 60	" "	" "	" "	" "	"	35762	"	10,065		202.
25	" 61	" "	" "	" "	Tyner "	"	17357	"	8,119		163.
25	" 62	" "	" "	" "	Warcer "	S.W.L.X.	433	Avia Gas		8047	161.
26	" 64	" "	" "	" "	" "	UTLX	74678	"		8086	162.
27	" 68	" "	" "	" "	" "	"	22485	"		8161	164.

TOTAL GROSS GALLONS AND TOTAL BARRELS (CARRY FORWARD TO LINE 2 OF AG 1)

⊗ Deducted from Fed Report U.S. Govt.

14 OF TAXABLE COLUMN (CARRY FORWARD TO LINE 19 OF AG 1)

Cameraman's Note:

This is poor copy, but is the best obtainable.

Cameraman's Note:

This is poor copy, but is the best obtainable.

Form AG 1-A (Rev. 3-1-43)

To:
State of Tennessee
Department of Finance and Taxation
Nashville, Tennessee

SCHEDULE -A-

RECEIPTS BY TANK CARS

SHEET NO. 3

This Schedule is part of Gasoline Tax and Inspection Fee Report and must be attached to Form AG 1.

Name of Taxpayer Standard Oil Co. of Louisiana

Month of January 1944

Date	Invoice or Stock Transfer Number	Name of Shipper	Point of Origin	Consignee	Destination	Cars Initial	Cars Number	Commodity	Gallons Non-Taxable Substances	Gallons Taxable Substances	Number Barrels
27	T.S. 69	Standard Oil Co. of La	Baton Rouge La	Standard Oil Co. of La	Tyner Tenn	U.T.L.X	19012	Naphtha		6,511	131.
28	" 70	" "	" "	" "	Warcer "	"	33659	Fuel Oil	10,084		202.
28	" 71	" "	" "	" "	Tyner "	"	33200	"	10,078		202.
28	" 72	" "	" "	" "	Warcer "	S.W.S.X	246	Avia Gas		8,086	162.
28	" 73	" "	" "	" "	Kingsport "	U.T.L.X	11699	Varsol	6,478		130.
29	" 77	" "	" "	" "	Tyner "	"	35033	Fuel Oil	10,083		202.
29	" 78	" "	" "	" "	Warcer "	"	7268	"	7,977		160.
30	" 80	" "	" "	" "	Tyner "	"	36374	"	9,969		200.
30	" 81	" "	" "	" "	Warcer "	"	5771	"	10,085		202.
30	" 82	" "	" "	" "	" "	"	7586	Gasoline		6,532	131.
30	" 83	" "	" "	" "	" "	"	21487	Avia Gas		8,046	161.
31	" 86	" "	" "	" "	Tyner "	"	5208	Fuel Oil	10,030		201.
31	" 87	" "	" "	" "	Warcer "	"	29040	"	9,984		200.
31	" 88	" "	" "	J. B. Johnson	Dunlap "	"	8600	"	6,546		131.
31	" 89	" "	" "	E. A. Lee	Pineville "	"	11445	"	6,501		131.
31	" 90	" "	" "	Standard Oil Co. of La	Clarksville "	"	24963	Naphtha		6,483	130.
13	" 25	" "	" "	" "	Tyner "	Erie	70463	"		432	9.
19	" 40	" "	" "	" "	" "	MP	121018	"		432	9.
22	" 54	" "	" "	" "	Warcer "	CNJ	19029	"		270	6.
7	202	Defense Supplies Corp. Marrero		" "	" "	U.T.L.X	28864	Aviation Gas		10,278	206.
		Special Fluid For Blending Gasoline						Gasoline		107	3.
									448,180	154,360	12,036
									-	6,544	-

TOTAL GROSS GALLONS AND TOTAL BARRELS (CARRY FORWARD TO LINE 2 OF AG 1)

1% OF TAXABLE COLUMN (CARRY FORWARD TO LINE 19 OF AG 1)

868

447

448

Form AG-1-B (Rev. 5-1-45)

To:
State of Tennessee
Department of Finance and Taxation
Nashville, Tennessee

SCHEDULE -B-

RECEIPTS BY VESSELS AND BARGES

SHEET NO. 1

This Schedule is part of Gasoline Tax and Inspection Fee Report and must be attached to Form AG 1

Name of Taxpayer: STANDARD OIL COMPANY OF LOUISIANA

Month of JANUARY 1944

DATE	NAME OF SHIPPER	POINT OF ORIGIN	CONSIGNEE	DESTINATION	NAME OF TOW	NAME OF BARGE	COMMODITY	GALLONS SHIPPED FROM REFINERY	GALLONS NON-TAXABLE SUBSTANCES REC'D	GALLONS TAXABLE SUBSTANCES REC'D	NET GALLONS SUBJECT TO TAX	OTHER BARGES
1	STANDARD OIL CO. LA	BATON ROUGE LA	STANDARD OIL CO. LA	MEMPHIS TENN	MEMPHIS	MTC 407	KERO	162,796	158,646			3,173.
1	" "	" "	" "	" "	"	"	FUEL OIL	85,645	79,171			1,584.
4	" "	" "	" "	" "	A.K. GORDON	"C"	GASO	732,379	1	724,039	724,039	14,481.
4	" "	" "	" "	" "	"	CHARLEY	KERO	271,703	269,485			5,390.
4	" "	" "	" "	" "	"	LA-101	TRACTOR FUEL	174,324	2	173,062	172,581	3,462.
4	" "	" "	" "	" "	"	"	FUEL OIL	353,567	348,874			6,978.
4	" "	" "	" "	" "	"	C	VARSOL	32,105	32,116			643.
4	" "	" "	" "	NASHVILLE	YOCONA	DOLLY	GASO	363,777	3	361,377	360,139	7,228.
19	" "	" "	" "	" "	"	STELLA	"	358,900	4	357,580	355,311	7,152.
7	" "	" "	" "	MEMPHIS	SLACK BARRETT	F	VARSOL	32,167	32,144			643.
7	" "	" "	" "	" "	A.K. GORDON	C	GASO	750,017	5	751,369	743,855	15,028.
20	" "	" "	" "	" "	"	LA-101	"	918,950	6	920,685	911,478	18,414.
20	" "	" "	" "	" "	"	"	AVIA GASO	174,731	7	174,537	172,984	3,491.
20	" "	" "	" "	" "	"	CHARLEY	GASO	306,828	8	303,944	303,760	6,079.
20	" "	" "	" "	" "	"	C	KERO	708,931	710,326			14,207.
20	" "	" "	" "	" "	"	LA-101	TRACTOR FUEL	116,936	9	116,380	115,767	2,328.
20	" "	" "	" "	" "	"	CHARLEY	FUEL OIL	205,094	208,090			4,162.
27	" "	" "	" "	" "	"	C	VARSOL	32,222	32,427			649.
27	" "	" "	" "	" "	JASON	MTC 407	GASO	38,031	10	42,475	42,050	850.
27	" "	" "	" "	" "	"	"	"	40,529	11	39,174	39,174	784.
	Gallons Rec	3,964,622	-1-	-2-	-3-		KERO	160,677	160,762			3,216.
	" Taxable	3,941,138	732,379	174,324	363,777		-4-	-5-	-6-	-7-		-8-
	Allowance	23,484	724,039	1,743	3,638		358,900	751,369	920,685	174,731		306,828
			8,340	172,581	360,139		3,589	7,514	9,207	1,747		3,068
			-9-	-10-	-11-		355,311	743,855	911,478	172,784		303,760
			116,936	42,475	40,529							
			1,169	425	3,974							
			115,767	42,050	1,355							
							TOTAL	6,020,309	2,032,041	3,964,622	3,941,138	119,942

Cameraman's Note:

This is poor copy, but is the best obtainable.

Cameraman's Note:

This is poor copy, but is the best obtainable.

Form AG 1-C (Rev. 5-1-41)

To:
State of Tennessee
Department of Finance and Taxation
Nashville, Tennessee

SCHEDULE C

RECEIPTS BY MOTOR VEHICLES

SHEET NO. 1

RECEIPTS OF TAX PAID GASOLINE

This Schedule is part of Gasoline Tax and Inspection Fee Report and must be attached to Form AG 1.

Name of Taxpayer STANDARD OIL CO. OF LOUISIANA

Month of January 1941

DATE	INVOICE OR STOCK TRANSFER NUMBER	NAME OF SHIPPER	SHIPPED FROM (POINT OF ORIGIN)	NAME OF CARRIER	ADDRESS OF CARRIER	CONSIGNEE	DESTINATION	COMMODITY	GALLONS NON-TAXABLE SUBSTANCES	GALLONS TAXABLE INGREDIENTS	GROSS GALLONS
		GULF REFINING CO.	ARDMORE NEW ORLEANS					GASO.		34546	~
		PAN-AMER. PET. CO.	" "					"		111903	~
		SOUTHERN PET. CO.	MEMPHIS TENN					"		189101	~

Form AG 1-D (Rev. 8-1-43)

To:
State of Tennessee
Department of Finance and Taxation
Nashville, Tennessee

SCHEDULE -D-

RECEIPTS BY PIPE LINE

SHEET NO. 1

This Schedule is part of Gasoline Tax and Inspection Fee Report and must be attached to Form AG 1.

Name of Taxpayer STANDARD OIL CO OF LOUISIANA

Month of JANUARY 1944

DATE	NAME OF SHIPPER	POINT OF ORIGIN	CONSIGNEE	DESTINATION	NAME OF CARRIER	COMMODITY	GALLONS NON-TAXABLE SUBSTANCES	GALLONS TAXABLE SUBSTANCES	NUMBER BARRELS
10	STANDARD OIL CO LA	BATON ROUGE, LA	STANDARD OIL CO LA	TYNER TENN.	PLANTATION PIPE LINE	KEROSENE	478004		8401.
12	" "	" "	" "	WARREN, "	"	"	632442		12645.
1	" "	" "	" "	TYNER "	"	GASOLINE		126,017	2521.
8	" "	" "	" "	" "	"	"		101,683	2034.
9	" "	" "	" "	" "	"	"		33,645	673.
11	" "	" "	" "	" "	"	"		210,006	4201.
12	" "	" "	" "	" "	"	"		118,148	2363.
17	" "	" "	" "	" "	"	"		105,031	2101.
18	" "	" "	" "	" "	"	"		105,000	2100.
24	" "	" "	" "	" "	"	"		168,006	3361.
25	" "	" "	" "	" "	"	"		121,310	2427.
26	" "	" "	" "	" "	"	"		168,002	3361.
28	" "	" "	" "	" "	"	"		126,003	2521.
29	" "	" "	" "	" "	"	"		126,003	2521.
31	" "	" "	" "	" "	"	"		167943	3359.
3	" "	" "	" "	WARREN "	"	"		168,002	3361.
3	" "	" "	" "	" "	"	"		7064	142.
7	" "	" "	" "	" "	"	"		390,017	7801.
8	" "	" "	" "	" "	"	"		469564	9392.
10	" "	" "	" "	" "	"	"		504,152	10083.
11	" "	" "	" "	" "	"	"		162,654	3254.
11	" "	" "	" "	" "	"	"		48974	980.
13	" "	" "	" "	" "	"	"		147105	2943.
14	" "	" "	" "	" "	"	"		102,099	2042.
14	" "	" "	" "	" "	"	"		156,586	3132.
17	" "	" "	" "	" "	"	"		736,879	14620.
19	" "	" "	" "	" "	"	"		153006	3061.
								63014	1261.

871

TOTAL GROSS GALLONS AND TOTAL BARRELS (CARRY FORWARD TO LINE 5 OF AG 1)

% OF TAXABLE COLUMN (CARRY FORWARD TO LINE 19 OF AG 1)

450

Cameraman's Note:

This is poor copy, but is the best obtainable.

Cameraman's Note:

This is poor copy, but
is the best obtainable.

Form AG 1-D (Rev. 9-1-48)

To:
State of Tennessee
Department of Finance and Taxation
Nashville, Tennessee

SCHEDULE -D-

RECEIPTS BY PIPE LINE

SHEET NO. 2

This Schedule is part of Gasoline Tax and Inspection Fee Report and must be attached to Form AG 1.

Name of Taxpayer STANDARD OIL CO. OF LOUISIANA

Month of JANUARY 1949

DATE	NAME OF SHIPPER	POINT OF ORIGIN	CONSIGNEE	DESTINATION	NAME OF CARRIER	COMMODITY	GALLONS NON-TAXABLE SUBSTANCES	GALLONS TAXABLE SUBSTANCES	BARRELS
19	STANDARD OIL CO. LA.	BATON ROUGE, LA.	STANDARD OIL CO. LA.	WARREN TENN.	MONTATION PIPE LINE	GASOLINE		233,542	16,671
20	" "	" "	" "	" "	" "	"		11,322	277
27	" "	" "	" "	" "	" "	"		41,718	975
28	" "	" "	" "	" "	" "	"		496,780	11,936
29	" "	" "	" "	" "	" "	"		685,558	13,717
31	" "	" "	" "	" "	" "	"		288,156	6764
1	PAN AMERICAN REF. CO.	" "	" "	TYNER "	" "	"		551,571	11,032
2	" "	" "	" "	" "	" "	"		33,600	672
9	" "	" "	" "	" "	" "	"		19,572	392
9	" "	" "	" "	" "	" "	"		71,400	1428
12	" "	" "	" "	" "	" "	"		141,527	2831
25	" "	" "	" "	" "	" "	"		27,300	546
28	" "	" "	" "	" "	" "	"		27,300	546
31	" "	" "	" "	" "	" "	"		27,300	546
3	" "	" "	" "	" "	" "	"		27,300	546
7	" "	" "	" "	WARREN "	" "	"		27,300	546
1	" "	" "	" "	" "	" "	"		36,372	728
11	" "	" "	" "	" "	" "	"		50,400	1008
19	" "	" "	" "	" "	" "	"		36,372	728
27	" "	" "	" "	" "	" "	"		50,400	1008
29	" "	" "	" "	" "	" "	"		42,000	840
3	GULF REFINING CO.	ARMOUREL CO.	" "	" "	" "	"		42,000	840
10	" "	" "	" "	" "	" "	"		42,000	840
24	" "	" "	" "	" "	" "	"		442,986	2260
26	" "	" "	" "	" "	" "	"		847,272	16,860
3	PURE OIL CO.	" "	" "	" "	" "	"		444,190	8884
20	" "	" "	" "	" "	" "	"		423,161	8464
								210,000	4200
								429,000	8580

872

TOTAL GROSS GALLONS AND TOTAL BARRELS (CARRY FORWARD TO LINE 5 OF AG 1)

TOTAL OF TAXABLE COLUMN (CARRY FORWARD TO LINE 10 OF AG 1)

451

Form AG 1-D (Rev. 9-1-48)

To:
State of Tennessee
Department of Finance and Taxation
Nashville, Tennessee

SCHEDULE -D-

RECEIPTS BY PIPE LINE

SHEET NO. 3

This Schedule is part of Gasoline Tax and Inspection Fee Report and must be attached to Form AG 1.

Name of Taxpayer STANDARD OIL CO OF LOUISIANA

Month of JANUARY 1944

DATE	NAME OF SHIPPER	POINT OF ORIGIN	CONSIGNEE	DESTINATION	NAME OF CARRIER	COMMODITY	GALLONS NON-TAXABLE SUBSTANCES	GALLONS TAXABLE SUBSTANCES	NUMBER BARRELS
26	PURE OIL CO.	ARMUCHEE GA.	STANDARD OIL CO OF LA	WARCEK TENN	PLANTATION PIPE LINE	GASOLINE		210,000	4,200
12	KEROSENE TRANSFERRED TO GASOLINE AT WARCEK TENN. 1/12/44				INTAKE TICKET				
	No. D-1971- TANK #19.							14054	—
	TOTAL GROSS GALLONS AND TOTAL BARRELS (CARRY FORWARD TO LINE 5 OF AG 1)						1052,2046	11547,872	251,746
	1% OF TAXABLE COLUMN (CARRY FORWARD TO LINE 19 OF AG 1)							115,479	

Cameraman's Note:

This is poor copy, but is the best obtainable.

873

452

Cameraman's Note:

This is poor copy, but is the best obtainable.

To:
State of Tennessee
Department of Finance and Taxation
Nashville, Tennessee

SCHEDULE A

RECEIPTS BY TANK CARS

SHEET NO. 1

This Schedule is part of Gasoline Tax and Inspection Fee Report and must be attached to Form AG 1.

Name of Taxpayer Standard Oil Co. of Louisiana

Month of January 1944

Date	Receipt or Inspection Number	Date of Receipt	Point of Origin	Consignee	Destination	Car Initial	Car Number	Commodity	Gallons Non-Taxable Purchases	Gallons Taxable Purchases	Gallons Taxable Gasoline
1 87			Receipts on Government Owned Gasoline								
					Knoxville, Tenn	UTLX	8545	Avia. Gas		6,[illegible]	85 [illegible]

TOTAL GROSS GALLONS AND TOTAL BARRELS (CARRY FORWARD TO LINE 2 OF AG 1)

1% OF TAXABLE COLUMN (CARRY FORWARD TO LINE 19 OF AG 1)

874

453

To
State of Tennessee
Department of Finance and Taxation
Nashville, Tennessee

SCHEDULE -B-

SHEET NO. 1

RECEIPTS BY VESSELS AND BARGES

This Schedule is part of Gasoline Tax and Inspection Fee Report and must be attached to Form AG 1.

Name of Taxpayer STANDARD OIL CO. OF LOUISIANA

Month of JANUARY 1944

NAME OF SHIPPER	POINT OF ORIGIN	CONSIGNEE	DESTINATION	NAME OF TOW	NAME OF BARGE	COMMODITY	GALLONS SHIPPED FROM REFINERY	GALLONS NON-TAXABLE DISTANCES DED'D	GALLONS TAXABLE DISTANCES DED'D	NET GALLONS SUBJECT TO TAX	REMARKS SAMPLES
Receipts of Government Owned Gasoline											
			Memphis, Tenn.	A.K. Greene	DPC 113	Av. Gas.			250389		
			" "	Minn Henry	R&R 103	"			66527		
			" "	Tennessee Jane	DPC 425	"			393225		
			" "	McCullough	LTC 24	"			329187		
			"	"	DPC 494	"			384031		
			"	"	"	"			399741		
			"	St. Louis	DPC 409	"			397519		
							2,533,977				
						TOTAL			2,133,987		

Cameraman's Note:

This is poor copy, but is the best obtainable.

[fol. 876] COMPLAINANT'S EXHIBIT 46

War Department

Army Service Forces

Office of the Judge Advocate General

Washington

14 September 1943

Memorandum for the Judge Advocate General.

Through: Acting Chief of Tax Division.

Subject: Conference with Tennessee tax officials.

1. Pursuant to order, Major Cicero C. Sessions, J.A.G.D., entrained from Washington, D.C., on 8 September 1943, for Nashville, Tennessee, in company with Major John H. Hendren, J.A.G.D., representing the Office of the Chief of Engineers, and Captain Joseph P. McNamara, J.A.G.D., representing the Office of the Chief of Ordnance. Immediately upon arrival in Nashville, Tennessee, on 9 September 1943, required report was made by wire to Commanding General, 4th Service Command, Atlanta, Georgia.

2. The above officers conferred on 9 September 1943 with the following officials of the State of Tennessee: W. F. Barry Jr., Solicitor General; Harry Phillips, Assistant Attorney General; George F. McCanless, Commissioner of Finance and Taxation; D. F. Henley, Assistant Commissioner of Finance and Taxation; R. L. Weakley, Director, Gasoline Tax and Oil Inspection Division. The subject of the conference was the taxation by the State of Tennessee under its gasoline tax and inspection fee laws of ether, toluene, gasoline, diesel fuel, locomotive oil, and other petroleum derivatives used by War Department contractors operating Chickasaw Ordnance Works and Holston Ordnance Works. Those products are purchased by the Government outside Tennessee and are made available to the contractors in the performance of their Government contracts. It was asserted by the War Department representatives that no taxes appeared to be due thereon, by the contractors or the Government. After discussion and consideration, the

above-named representatives of the State of Tennessee conceded that petroleum products purchased by the United States outside Tennessee, imported into the state and used in the performance of war contracts, with ownership retained in the Government, are not subject to the taxes under discussion. It was also conceded that as to toluene, ether and similar products used in the manufacture of explosives, no reports of quantities purchased need be furnished the [fol. 877] state. Further conferences were held on 10 September 1943, at which the state officials confirmed their position.

3. On 11 September 1943, I entrained from Nashville, Tennessee, and returned to proper station on 12 September 1943.

Cicero C. Sessions, Major, J.A.G.D.

[fol. 878] COMPLAINANT'S EXHIBIT 49

January 28, 1943

Mr. Joe Holbrook, Gasoline Inspector
Dresden, Tennessee

Dear Joe:

The Standard Oil Company ships several cars of aviation gas to Union City each month. This gasoline is taxable and is evidently billed to the Standard Oil Company even though it may be used at the aviation school.

Please report these cars on your IF-4-A.

Yours very truly, R. L. Weakley, Director, Gasoline Tax & Oil Inspection Division.

RLW:vs.

[fol. 879] COMPLAINANT'S EXHIBIT No. 54

Law Offices

Armistead, Waller, Davis & Lansden

Telephone 6-0131

American Trust Building

Nashville, Tennessee

February 23, 1943

Mr. R. L. Weakley, Director, Gasoline Tax & Oil Inspection Division, Department of Finance & Taxation, Nashville, Tennessee.

Re: Government Owned Aviation Gasoline Stored in Tennessee in Tankage Owned by Standard Oil Company of Louisiana.

DEAR MR. WEAKLEY:

A few days ago you asked me to inform you as to the exact method pursuant to which Government owned aviation gasoline is being stored in Tennessee in tankage owned by Standard Oil Company of Louisiana. I tried to reach you by telephone but found that you were out, and in any event think it best to give you this information in writing.

Two grades of this aviation gasoline are involved. Grade 100 and 91. Grade 100 is used exclusively by the Army Air Corps. Grade 91 is also used by commercial airlines who are customers of Standard Oil Company of Louisiana. It results that Grade 100 gasoline is separately stored and not commingled with any gasoline owned by Standard Oil Company of Louisiana. On the other hand, Grade 91 Gasoline is commingled not only at the Memphis Riverside Terminal but also at Nashville, Knoxville, and Kingsport.

The gasoline in question is purchased by the Defense Supplies Corporation at source of manufacture under a contract with Standard Oil Company of New Jersey. All that Standard Oil Company of Louisiana has to do with it is pursuant to a service contract. That is to say, Standard Oil Company of Louisiana bills the Government for a service charge for barging the gasoline to Tennessee and storing it for the

account of the Government. The gasoline is then loaded out of these storage tanks into Government owned or commercial tank cars or company trucks for such destinations as the Army designates.

The Army is currently purchasing other aviation gasoline from other companies which is being shipped into Tennessee by railroad tank car from outside the State. It is my understanding that the State of Tennessee does not intend to collect the Tennessee gasoline tax and inspection fee on such gasoline. Standard Oil Company of Louisiana is concerned to know whether the State will take the position that aviation gasoline is taxable when handled in accordance with the service contract above referred to, and would appreciate a ruling on the point which can, in turn, be transmitted to the Army authorities for their information and guidance.

Yours very truly, William Waller.

WW:mr

cc: General W. F. Barry.

[fol. 880] COMPLAINANT'S EXHIBIT No. 54

[fol. 881] COMPLAINANT'S EXHIBIT No. 55

July 19, 1943

Mr. R. L. Weakley, Director, Gasoline Tax & Oil Inspection Division, Department of Finance & Taxation, Nashville, Tennessee.

Re: Commingling of Company Owned & Government Owned Gasoline

DEAR MR. WEAKLEY:

After talking with Mr. Browder of the Standard Oil Company at Warcer (Knoxville), Tennessee, I found that Standard is storing and delivering Aviation Gasoline for the United States Navy for use at the Knoxville Airport, which is a Naval Air Corps Station. This gasoline is shipped into Knoxville in tank cars from Baton Rouge, Louisiana and all of the 100 octane product is the property of the U. S.

Government as soon as it is refined. This is kept in a separate tank. The lower octane Aviation Gasoline is not all government owned, but both government owned and company owned gasoline is stored in the same tank.

At the Standard Oil Company River Terminal at Memphis, Tennessee the procedure is practically the same, except that most of the gasoline is shipped in by barge. One product is kept in a separate tank, but another tank is used for both company owned and government owned gasoline. On May 21st an entire barge load, containing 300,845 gallons of government gasoline, was unloaded into this tank.

In Chattanooga, Tennessee the Gulf Refining Company is storing the Aviation Gasoline for the government and delivering it to the airport, but the agent there assured me that it is kept entirely separate from their own gasoline and that they were drawing up a lease with the U. S. Government for this tank.

These three locations are handling most of the government gasoline now, but doubtless others will start storing either in this or some other manner, and our department should have a much better check on this gasoline. I would recommend that government owned gasoline be kept separately from company owned gasoline, and that all these tanks be leased to the government. This is the only way that I can see which will enable us to keep up with a situation that is already out of hand.

Yours very truly, George S. Hale, Jr., Examiner.

[fol. 882] COMPLAINANT'S EXHIBIT No. 57

October 29, 1943

Standard Oil Company of Louisiana, 1211 Union Avenue, Memphis 1, Tennessee

Attention: Mr. H. E. Desaix

GENTLEMEN:

We are returning herewith the photostatic copies of exhibits you prepared during our discussion regarding government gasoline stored by your company.

Yours very truly, R. L. Weakley, Director, Gasoline Tax & Oil Inspection Division

GSH:vs
encls.

[fol. 883] COMPLAINANT'S EXHIBIT No. 58

State of Tennessee
Department of Finance and Taxation
Nashville
(3)

George F. McCanless, Commissioner
War Memorial Building

October 29, 1943

Standard Oil Company of Louisiana, 1211 Union Avenue, Memphis 1, Tennessse

Attention: Mr. H. E. Desaix

GENTLEMEN:

We are returning herewith the photostatic copies of exhibits you prepared during our discussion regarding government gasoline stored by your company.

Yours very truly, R. L. Weakley, Director, Gasoline Tax & Oil Inspection Division

GSH:vs
encls.

[fol. 884] Exhibit A: Proposed form of accounting for U. S. Government owned Aviation Gasoline—91 octane. Actual figures for the month of June have been used.

Exhibit B: Stock summary maintained monthly to account for all Government owned Aviation Gasoline in the State of Tennessee.

Exhibit C: State Inspector's Report of receipt of Government owned gasoline at Riverside Terminal.

Exhibit D: State Inspector's Report of receipt of Company owned Aviation Gasoline at Riverside Terminal.

Exhibit E: Specimen of statement sent to receiving Government Agency of Deliveries made within a certain period. The total of all statements of this type will support the disbursements shown on Exhibit A.

Exhibit F: Memorandum invoice covering one of the deliveries shown on Exhibit E and bearing the signature of the receiving party for the Government.

Note: Page 462 is blank

Cameraman's Note:

This is poor copy, but is the best obtainable.

EXHIBIT "A"

[illegible]

Deer[illegible]

[illegible] 26,560

Receipts [illegible] June [illegible] 1943 [illegible] Ben [illegible] 321 [illegible]
[illegible] (Ex. "D")
268,593

Less-Gallonage [illegible]
Operations [illegible]
Was [illegible] 181,272

Balance Received [illegible]	87,321
Total Govt. Own [illegible]	713,881

Credits:

Delivered During [illegible] (Ex. [illegible])	382,383
Closing Inventory - June 30 1943 - [illegible]	307,825
Stock Loss	23,673
Total Accounted [illegible]	713,881

EXHIBIT A

EXHIBIT B

June 1943 and Feb through June 1943

	Opening Amount	In Transit Previous Month	Rec'd from Refinery	From Army or Other Stations	From Navy a/c	Gain	TOTAL DR.	Delivered to Army/Navy	To Army or Other Stations	In Transit	To Army a/c	Closing Amount	Loss	TOTAL CR.
			2344867			16571		2061459	476000			358735		
	9505							6240	2824				21	
				9402				93601					501	
		20008		224985				204025				35000	25448	
				60001	5312				57049			14393	3871	
	3623			37049	775	718		37768				4297		
	553868	20008	2344867	516137	6087		3440967	2499443	516137			412435	129	
	9108											9108		
	24674					5285			17549		5211			
				17549				16246			775			
	48782			17549		01767	48990	16246	17549		6087	9108		
		87321		319947				29788	371815			322774		
								316674						
	10116			29302				21055						
	8775			22565					16846			10097		
				16846				14866						
	87891	10116	87321	388661		110543		382383	388661			307824		
	6870	11428030	6439835	N- 23793		17982722		11039790	6439835		N- 23793	442432		
		65262	33055	A- 23793		100111		55196	33055		A- 23793	9108		
		1401054	1068879		4306	2412239		1091665	1068879		Case 6870	307824		
		Remainder						Sold						
	29395	1972133				2189528		54446	1467677			1742042	100857	

Cameraman's Note:

This is poor copy, but is the best obtainable.

465

887

EXHIBIT C.

AFTER PUMPING BEFORE PUMPING

GASOLINE TAX AND [illegible] DIVISION
DEPARTMENT OF FINANCE AND TAXATION
NASHVILLE, TENNESSEE

Memphis, Tenn. June 8th 1943 19
LOCATION OF TECHNICIAN

Name of Company Receving Cargo, Standard Oil Co. Address Riverside Terminal, Memphis, Tenn.

Kind of Substance Gasoline, Aviation 91

Gravity _____ Flash _____ Opening Temp. 86 Factor 9816

Closing Temp. 77 Factor 9880

From Barge Ben Str. Sprague Tow.

	Tank Height		Ullage		Innage		Measured Gallons	60° Gallons
	Feet	Inches	Feet	Inches	Feet	Inches		
Gross					39	10 5/8		
Water						1 1/2		
Net					39	9 1/8	538216	528313
Gross					46	3 5/8		
Water						1 3/4		
Net							620147	612705
								84392

Tank Numbers 17 Measured Gallons 60° Gallons Invoice Gallons Barrells

84392

Delivered to Bulk Plant (IF-4C) 3091

87483 - Correct Gallons after Reducing - 42:1

No. of Seal Broken 15553

NO. of Seal 13672 Affixed After Pumping Completed

All above matters as to Grade, Measurements, Calculations and Quantities were supervised or performed by us jointly. We hereby certify that all of same is correct.

SIGNATURE OF COMPANY REPRESENTATIVE

SIGNATURE OF STATE REPRESENTATIVE

Cameraman's Note:

This is poor copy, but is the best obtainable.

Cameraman's Note:

This is poor copy, but is the best obtainable.

Form IF-4-B

INSPECTION REPORT
STATE OF TENNESSEE
GASOLINE TAX AND OIL INSPECTION DIVISION
DEPARTMENT OF FINANCE AND TAXATION
NASHVILLE, TENNESSEE

EXHIBIT "D"

888

[illegible] 1 19 42
LOCATION OF TECHNICIAN

Name of Company Receving Cargo [illegible] Address [illegible]

Kind of Substance [illegible]

Gravity _____ Flash _____ Opening Temp. _____ Factor [illegible]

Closing Temp. _____ Factor [illegible]

EXHIBIT D

AFTER PUMPING BEFORE PUMPING

	Tank Height		Ullage		Innage		Measured Gallons	60° Gallons
	Feet	Inches	Feet	Inches	Feet	Inches		
Gross								
Water								
Net								
Gross								
Water								
Net								

Tank Numbers	Measured Gallons	60° Gallons	Invoice Gallons	Barrells
17	[illegible]	[illegible]		
	[illegible]	[illegible]		
		13,272		

No. of Seal Broken

NO. of Seal Affixed After Pumping Completed

All above matters as to Grade, Measurements, Calculations and Quantities were supervised or performed by us jointly. We hereby certify that all of same is correct.

[illegible]
SIGNATURE OF COMPANY REPRESENTATIVE

[illegible]
SIGNATURE OF STATE REPRESENTATIVE

466

Cameraman's Note:

This is poor copy, but is the best obtainable.

467

EXHIBIT E

Exhibit 'E'

14 CS

STANDARD OIL COMPANY OF LOUISIANA
MEMPHIS, TENNESSEE

DELIVERIES OF 91 AVIATION GASOLINE

TO: SUPPLY OFFICER
70TH SUB-DEPOT
MEMPHIS, TENNESSEE

FOR PERIOD June 9, 1943 THRU June 15, 1943

FROM Point of Shipment: Memphis Bulk Plant, Memphis, Tennessee

Date	S. O. Co. of La. Billing Reference	Govt. B/L Number	* Method	Tank Car or Truck Initial & Number	Quantity Gallons
6-14-43	Govt. T-6		0	L-720	3,100
6-14-43	" T-7		0	L-720	3,100
6-14-43	" T-8		0	L-720	3,100
6-11-43	" T-9		0	L-716 and L-814	3,100
6-11-43	" T-10		0	L-716 and L-814	3,100
6-11-43	" T-11		0	L-716 and L-814	3,100
				TOTAL	18,600

*Method of Delivery
0-Our Own Transport Tank Truck
1-Our Regular Tank Truck
5-Common Carrier Transport Truck
8-Tank Car
Army-Tank Trucks Owned by Army Air Forces.

Quantities of 4000 Gallons [illegible]

889

Evidence

TER.-TRS.

MEMORANDUM

FROM STANDARD OIL CO. OF LOUISIANA, at MEMPHIS, TENN.

Consigned to Sub. Depot Supply Office

Destination Memphis State of Tenn. County of

Route To the Sub. Depot. Equipment No. 71

CONTENTS	QUANTITY
Aviation Gas #91	3100.
@ 80	
	2

NET GALLONS AT 60°

STANDARD OIL CO. OF LOUISIANA, SHIPPER H.M.S.

THIS SHIPMENT HAS BEEN FORWARDED FREIGHT CHARGES

70th Sup Depot

RECEIVED BY R. P. Stewart

REDFORD-AMERICAN SALES BOOK CO., INC., NIAGARA FALLS, N.Y.

EXHIBIT F

898

890

Cameraman's Note:

This is poor copy, but is the best obtainable.

[fol. 891] COMPLAINANT'S EXHIBIT No. 59

ESSO

STANDARD OIL COMPANY OF LOUISIANA
Union and Bellevue

F. W. Butler, Division Manager; M. E. West, Asst. Division Manager; T. J. Hickey, Sales Manager.

Memphis, Tenn., December 30, 1943

In reply please refer to file 2219; Barge "C"—November 15; Barge "RTC-52"—November 11.

State of Tennessee, Department of Finance and Taxation,
Nashville 3, Tennessee

Attention: Mr. J. C. Greene

GENTLEMEN:

The subject barges, mentioned in your December 29 letter, contained U. S. Government owned Aviation Gasoline. We are instructing our Terminal Superintendent to always inform your Inspector when the gasoline being unloaded is government-owned so that your man can indicate this fact on his report.

To comply with the request contained in Mr. Weakley's December 16 letter we will, beginning with our December report, list the receipts of government owned Gasoline on a separate schedule. This should further assist you in checking these movements.

Yours for Victory, R. J. Rugger, Office Manager.

HED:rd

[fol. 892] COMPLAINANT'S EXHIBIT No. 60

March 29, 1943

Standard Oil Company of Louisiana, 1211 Union Avenue, Memphis, Tennessee

Subject — UTLX 14395, UTLX 8659 & UTLX 52740

GENTLEMEN:

Our Inspector at Warcer, Tennessee reports that the first two cars captioned above containing aviation gasoline was delivered to you at Warcer on February 9th.

The railroad agent at Danley, Tennessee reports the other car containing gasoline consigned to the Wesco Paving Company of Nashville.

None of these cars appear on your February report. We will appreciate it if you will check your records and advise.

Yours very truly, Gasoline Tax & Oil Inspection Division, J. C. Greene, Supervisor, Examiner

JCG:vs

[fol. 893] COMPLAINANT'S EXHIBIT No. 61

ESSO

STANDARD OIL COMPANY OF LOUISIANA

Union and Bellevue

F. W. Butler, Division Manager; M. E. West, Operations Manager, T. J. Hickey, Sales Manager.

Memphis, Tenn., April 6, 1943

In reply please refer to file 2219; UTLX Cars Nos. 14395, 8659, 52740.

State of Tennessee, Department of Finance and Taxation, Nashville, Tennessee

Attn: Mr. J. C. Greene

GENTLEMEN:

Replying to your March 29 letter, the first two cars contained U. S. Government owned 100 octane aviation gasoline shipped from Baton Rouge, Louisiana.

Regarding the other car, we have no record of it being shipped to the Wesco Paving Company. We are inclined to believe the railroad has given you incorrect information as we do not ship gasoline in tank cars to anyone except Federal agencies.

Yours for Victory, F. W. Butler.

HED-vg

BUY AT THE ESSO SIGN FOR HAPPY MOTORING

[fol. 894] COMPLAINANT'S EXHIBIT No. 67

STATE OF TENNESSEE
DEPARTMENT OF FINANCE AND TAXATION
Nashville
(3)

George F. McCanless, Commissioner
War Memorial Building

February 29, 1944

Standard Oil Company, 1211 Union Avenue, Memphis, Tennessee

Subject — UTLX 8191

GENTLEMEN:

The Freight Agent at Nashville reports the above captioned car on January 3rd from Baton Rouge to Vultee Aircraft Corporation, Nashville, containing aviation gasoline.

We will appreciate your advising us, if possible, whether or not this gasoline was United States Government gasoline. Of course, Vultee Aircraft Corporation is not a branch of the United States Government and it is not entitled to an exemption of the tax, nor are they qualified to receive gasoline on which the tax has not previously been paid.

Yours very truly, Gasoline Tax & Oil Inspection Division, J. C. Greene, Supervisor, Examiner.

JCG:vs
30—330, 338

[fol. 895] DEFENDANT'S EXHIBIT #1

United States of America

Department of the Air Force

Dayton, Ohio, 4, May, 1950.

I hereby certify that the attached documents are true copies of copies of Contract No. W. 33-038 ac-1689, dated 20 December 1943, and Change Order No. 1 and Supplemental Agreement No. 2 thereto, on file in the Air Materiel Command Contract, Research and Development Records Depository, Wright-Patterson Air Force Base, Dayton, Ohio. I further certify that the documents from which the attached copies have been reproduced are part of the official files of The United States of America.

R. C. Brown, Captain, USAF.

I hereby certify that R. C. Brown, Captain, USAF , who signed the foregoing certificate, is the Base Adjutant and Records Officer, Wright-Patterson Air Force Base, Dayton, Ohio , and that to his certification as such full faith and credit are and ought to be given.

In Testimony Whereof, I Thomas K. Finletter, Secretary of the Air Force, have hereunto caused the seal of the Department of the Air Force to be affixed and my name to be subscribed by the Administrative Assistant to the Secretary of the Department, at the City of Washington, this 10 day of May , 1950

Thomas K. Finletter, Secretary of the Air Force,
by John J. McLaughlin, Administrative Assistant.
(Seal.)

[fol. 896] Approved: 1 March 1944
Re: Direction of the Secretary of War under the Provisions of the First War Powers Act, 1941, and Executive Order 9001, dated 27 December 1941.
Contract W 33-038 ac-1689 (11563)
AFP: 543794 A
Class: 06A
(S) D. C. Swatland,

Colonel, Air Corps,
Chief, Procurement Division,
Materiel Command.

Fixed Price Service Contract

Army Air Forces War Department

RJF:mlh

Contractor: River Petroleum Corporation.

Contract for: Transportation, Storage, Handling and Delivery of Government-Owned Aircraft Engine Fuel

Place: Army Air Forces, Materiel Command, Wright Field, Dayton Ohio. The Finance Officer U. S. Army, Mutual Home Building, 120 West Second Street, Dayton 2, Ohio, is designated as the officer to make payments in accordance with this contract.

The services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to the following Allotment, the available balance of which is sufficient to cover the cost of same.

2-4006 P 412-03 A 212/40705

Funds not to exceed $594,000.00 have been obligated for payment for the performance of services called for under the terms of this contract.

[fol. 897] Fixed Price Service Contract

Army Air Forces

War Department

This contract entered into this 20th day of December, 1943, by and between the United States of America, hereinafter called the "Government", represented by the Contracting Officer executing this contract *, and River Petroleum Corporation, a corporation organized and existing under the laws of the State of Louisiana, having its prin-

* This contract was negotiated under the authority of the First War Powers Act, 1941, and Executive Order No. 9001, December 27, 1941.

cipal place of business in the City of New Orleans, in the State of Louisiana, hereinafter called the "Contractor".

WITNESSETH

Whereas, in the prosecution of its war effort, the Government deems it necessary to contract with various individuals, firms, associations, or corporations, for the storage and handling of aviation fuel and the rendering of miscellaneous services in connection therewith at strategically situated locations throughout the United States, and

Whereas, it has been administratively determined that established facilities of the Government are inadequate to provide these essential services and therefore the execution of such agreements will promote the interests of the Government, and

Whereas, the Contractor represents that it is the owner of, and/or can provide storage and handling facilities adequate for the storage and handling of Government-owned aviation fuel under this contract, and possesses the means and ability to perform other necessary services in connection therewith,

Now, therefore, in consideration of the premises and of the mutual covenants and agreements herein contained and for other good and valuable considerations, the parties hereto agree as follows:

Article 1—Scope of this Contract

(a) The Contractor shall furnish and supply to the Government storage and handling facilities in the capacities, at the points, and for the prices indicated in Exhibit "A", which is hereto attached and hereby made a part hereof and shall render services in connection therewith, as hereinafter more particularly described, in receiving, storing, handling and loading Government-owned fuel (the word "fuel" as used hereinafter shall mean Government-owned fuel unless otherwise specified) of the grade or grades indicated in said Exhibit "A". Said services shall be performed when and as, during the period or periods indicated in said Exhibit "A", the Government shall request and

direct the Contractor to supply the same. Said services shall be as follows:

[fol. 898] (1) To order stocks of fuel to be shipped to Contractor's storage facilities as may be directed by the Contracting Officer.

(2) To receive such stocks of fuel into such storage facilities, and store the same as may be directed by the Contracting Officer.

(3) To load and ship such stocks of fuel from such storage facilities as may be directed by the Contracting Officer.

(4) To keep a complete and adequate record of and, if necessary, to trace and expedite all shipments on orders placed and on loadings made by the Contractor as directed under the terms hereof.

(5) To render reports as of 0800 o'clock daily, by telegraph or telephone, at the expense of the Government, giving the following information pertaining to each terminal (storage from which shipments are regularly made to more than one point):

(a) Total amount of each grade of fuel shipped during the preceding twenty-four (24) hours.

(b) Tank-car numbers by grade to each destination.

(c) Balances of each grade of fuel on hand at the close of the twenty-four (24) hours covered by the report.

(6) To render reports in duplicate by mail (air mail if normal mailing time is over twenty-four (24) hours) covering in detail receipts, shipments and losses or gains for the following periods of each month: First to eighth, inclusive; ninth to fifteenth, inclusive; sixteenth to twenty-third, inclusive, and twenty-fourth, to the last day thereof, inclusive. This quarter monthly report shall contain all the information provided for in and shall be prepared as an affidavit on "Government Owned Stock Report", Air Service Command Form No. 2013. Upon request of the Contractor directed to the Property Officer, Fuels and Lubricants

Branch, Air Service Command, Patterson Field, Fairfield, Ohio, blank forms No. 2013 will be made available to the Contractor.

[fol. 899] (7) To render any additional reports in such other form or fashion as may be directed in writing by the Property Officer, Fuels and Lubricants Branch, Air Service Command, Patterson Field, Fairfield, Ohio, relating to the reporting of stock balances, receipts, loadings, deliveries and stock losses or gains.

(8) To provide and maintain adequate equipment and personnel sufficient for proper storage and efficient handling of all shipments received and loadings made which may be called for under the terms hereof and to accomplish all such services in accordance with the best standard commercial practices.

(b) Contractor shall make necessary preparations or alterations in the loading and unloading facilities at its storage point or points in order to perform efficiently the services rendered hereunder in accordance with standard commercial practice, and shall clean and/or condition or recondition said facilities to make them suitable for the handling of aviation fuel.

(c) The Contractor shall exercise due diligence in placing such orders and making such deliveries as may be directed under the terms of Paragraph (a) hereof and shall accomplish the receipt and delivery of such stocks of fuel within a reasonable time after receipt of instructions from the Contracting Officer therefor. Contractor shall have the responsibility of maintaining stocks of fuel in its storage facilities sufficient to meet through-put requirements, provided that the fuel is available and allocated at the refineries or sources thereof and provided transportation facilities are adequate.

(d) Contractor shall provide a responsible source of contact twenty-four hours a day, seven days a week, at or near the storage facilities referred to in Exhibit "A" for the purpose of receiving such instructions as may be issued under the terms of this contract and the Contractor shall immediately, upon execution of the contract, provide the Commanding General, Air Service Command, Patterson Field, Fairfield, Ohio, Attention: Property Officer, Fuels

and Lubricants Branch, with the name or names, addresses and telephone numbers of the respective responsible parties assigned to such storage facilities.

[fol. 900]

(e) Contractor shall be responsible, until delivery thereof has been accomplished, for the total gallonage received at its storage facilities on the basis of volume, determined as hereinafter set forth, corrected to 60° F.:

(1) Receipts made from tank wagon or tank truck (of under 4000 gallons capacity): On an actual volume basis, without temperature correction,

(2) Receipts made from tank car or tank truck (of 4000 gallons capacity or more): on a volume basis corrected to 60° F.

Provided that if any such conveyance referred to in (1) or (2) shows, after proper gauging, a volume, corrected to 60° F. when required hereunder, in excess of one per cent (1%) less than the volume, similarly corrected, shipped as the same appears on the bill of lading or equivalent shipping document, the Contractor shall, jointly with the local freight agent or truck operator, and the Army Air Forces Inspector in charge, if available, determine the actual shortage or loss, and the Contractor shall notify the Commanding General, Air Service Command, Patterson Field, Fairfield, Ohio, Attention: Property Officer, Fuels and Lubricants Branch, by telegram of the amount of shortage and the reason therefor, if known. In case of any such shortage the Contractor shall sign the bill of lading or equivalent shipping document for the actual quantity received and not for the quantity shipped. As used in (1) and (2) hereof the words "volume basis" mean volume measured by gauge, if any, on said conveyance and if none, then by gauge on Contractor's receiving facilities.

(3) Receipts made from tanker, barge or other vessel: on a volume basis corrected to 60° F.

Provided that such vessel and the receiving shore tanks shall be gauged jointly by the Contractor, the master of the vessel and the Army Air Forces Inspector in charge, if

available, before the unloading of the vessel and again after such unloading; in the event that the volume, corrected to 60° F., received by the Contractor is in excess of one per cent (1%) less than the volume, corrected to 60° F., shipped in such vessel as appears on the applicable shipping document, the actual shortage or loss shall be determined by the aforementioned parties and the Contractor shall notify the Commanding General, Air Service Command, Patterson Field, Fairfield, Ohio, Attention: Property Officer, Fuels and Lubricants Branch, by telephone of the amount of such shortage and the reason therefor, if known. In case of such shortage, the Contractor shall sign the Marine bill of lading or applicable shipping document for the actual quantity received and not for the quantity shipped.

[fol. 901]

(f) Contractor shall be allowed not to exceed one per cent (1%) for any loss of volume in fuel for each throughput at its storage facilities and the amounts of such losses shall be indicated on the monthly reports called for under Paragraph (a) (7) hereof. In the event of any shortages or losses in excess of the limitations herein imposed, the Contractor shall submit to the Property Officer herein named, a statement of such losses within ten (10) days after the date of expiration or termination of this contract, together with the reasons therefor, if known; and the Contractor shall not be liable, under the terms hereof, for such excessive shortages or losses unless the same result from gross negligence, bad faith, or willful misconduct on the part of one or more of the Contractor's corporate officers or other representatives having supervision or direction of the operation of the whole of the Contractor's business or of the whole of any terminal or bulk plant or storage facilities operated by the Contractor and used in the performance of this contract.

(g) All shipments made by common carrier under the terms hereof either to or from Contractor's storage facilities shall be made on Government bills of lading. Contractor shall mail applications for such Government bills of lading to the Commanding General, Air Service Command, Patterson Field, Fairfield, Ohio, Attention: Property Officer, Fuels

and Lubricants Branch. In the event that the Contractor is instructed, under the terms of this contract, to ship fuel on collect commercial bills of lading for conversion to Government bills of lading, the original and two (2) memorandum copies of such collect commercial bills of lading will be mailed to the Transportation Officer at destination and upon shipments to destinations where there is no Transportation Officer regularly assigned, such as terminals or other activities, the above-mentioned collect commercial bills of lading shall be mailed to the Commanding General, Air Service Command, Patterson Field, Fairfield, Ohio, Attention: Commercial Transportation Section, where such bills of lading will be converted to Government bills of lading.

(h) In the event Contractor violates any instructions as to delivery of fuel out of its storage facilities, either as to method, date, quantity, destination or grade, or otherwise, which may be specified under the terms hereof, the transportation costs involved in such unauthorized delivery shall be deducted from amounts otherwise due the Contractor hereunder.

(i) The parties agree the services described herein, if any, heretofore performed by the Contractor, at the request of the Government, were in contemplation of and are subject to the provisions of this contract, the same as though performed by the Contractor after the date of execution hereof.

(j) All reports called for under the terms of this Article shall be made to the Commanding General, Air Service Command, Patterson Field, Fairfield, Ohio, Attention: Property Officer, Fuels and Lubricants Branch.

[fol. 902] Article 2—Consideration

The Government will pay to the Contractor, upon satisfactory performance of the services herein specified, the prices set forth in Exhibit "A" during the period specified therein or any extension or renewal thereof, if such extension or renewal is provided for elsewhere in this contract. For payment purposes the gallonage handled by Contractor through its storage facilities shall be determined as follows:

(1) Upon loadings made into tank wagon or tank truck (under 4000 gallons capacity): on an actual volume basis without temperature correction.

(2) Upon bulk loadings by any other means (4000 gallons capacity or more): on a volume basis corrected to 60° F.

(3) As used in (1) and (2), the words "volume basis" mean volume measured by gauge, if any, on said conveyance or vessel and if not, then by gauge on Contractor's delivering facilities.

Article 3—Inspection and Acceptance for Payment

(a) The points of inspection and acceptance for payment by the Government for the services called for hereunder shall be the respective points at which such services are completed.

(b) Payment will be made by the Government upon receipt of the following:

(1) Invoices properly prepared and certified. Invoices shall be prepared in quadruplicate and addressed to the Finance Officer at the location designated on the cover page hereof. Such invoices shall be serially numbered and dated, and shall include the contract number, the grade and specification number of the material, consignee, shipping containers (tank trucks, tank cars, etc.), date of shipment, bill of lading number, where applicable, gallonage of material computed as specified herein, and the unit prices therefor. The original and first copy of each invoice shall be mailed direct to said Finance Officer. The triplicate and quadruplicate copies shall be mailed direct to the Accountable Officer, designated in Article 8 hereof. The Accountable Officer will prepare necessary certificates for services and will forward such papers with the triplicate copy of the invoice to said Finance Officer for payment.

[fol. 903] (2) Reports rendered in duplicate by first-class mail, four (4) times per month as specified elsewhere in this contract. These reports shall be dispatched with and to the same addresses as the triplicate and quadruplicate copies of the invoices in subparagraph (1) above.

(3) Certificates in duplicate containing all the information provided for in the form specified in Exhibit

"B", which is hereto attached and hereby made a part hereof. These certificates shall be prepared on letter sized paper 8" x 10½", and shall be distributed on the same date upon which containers are loaded and/or released as follows:

Original copy to:

Consignee, properly addressed and forwarded immediately upon the loading of the conveyances. In case of tanker or barge shipment such certificates shall be given to the captain or master of the vessel. In the case of tank car shipment the certificate shall be placed in a sealed envelope and sent by first-class mail. In case of truck shipment such certificate shall be placed in a sealed envelope and entrusted to the driver of such truck,

Duplicate copy to:

Army Air Forces Inspector (Fuel and Oil) if such inspector is assigned to Contractor's facilities. If no inspector is so assigned the certificate shall be mailed to the Commanding General, Materiel Command, Wright Field, Dayton, Ohio, Attention: Fuels, Lubricants and Chemicals Branch, Inspection Division.

(c) The Government reserves the right to inspect and approve the procedure used at Contractor's storage facilities in inspecting, cleaning and sealing containers used for shipment of the above-mentioned fuel. In addition, any Contractor's storage facilities which possess laboratory facilities as of the date of this contract shall accomplish specification test of the fuel whenever required by Army Air Forces Inspector (Fuel and Oil).

[fol. 904] Article 2—Renegotiation Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended

(a) Upon the written demand of the Secretary, at such period or periods when, in the judgment of the Secretary, the profits accruing to the Contractor under this contract can be determined with reasonable certainty, the contract

price will be renegotiated to eliminate therefrom any amount found as a result of such renegotiation to represent excessive profits. The demand of the Secretary shall fix a place for renegotiation and a time for commencement thereof not later than one year after the close of the fiscal year of the Contractor within which completion or termination of this contract, as determined by the Secretary, occurs.

(b) The Contractor will furnish to the Secretary such statements of actual costs of production and such other financial statements, at such times and in such form and detail, as the Secretary may prescribe, and will permit such audits and inspections of its books and records as the Secretary may request.

(c) The Government shall retain from amounts otherwise due the Contractor, or the Contractor shall repay to the Government if paid to him, any amount of the contract price found as a result of such renegotiation to represent excessive profits and not eliminated through reductions in contract price or otherwise, as the Secretary may direct.

(d) The Contractor will include in each subcontract described in paragraph (f) (2) (ii) of this Article and in each subcontract for an amount in excess of $100,000 described in paragraph (f) (2) (i) of this Article, made by the Contractor under this contract, the following provision:

"Article—Renegotiation Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended

(1) Upon the written demand of the Secretary, at such period or periods when, in the judgment of the Secretary, the profits accruing to —— —— (Subcontractor) under this contract can be determined with reasonable certainty, the Secretary and —— —— (Subcontractor) will renegotiate the contract price to eliminate therefrom any amount found as a result of such renegotiation to represent excessive profits. The demand of the Secretary shall fix a place for renegotiation and a time for the commencement thereof not later than one year after the close of the fiscal year of the

subcontractor within which completion or termination of this contract, as determined by the Secretary, occurs.

(2) —— —— (Subcontractor) will furnish to the Secretary such statements of actual cost of production and such other financial statements, at such times and in such form and detail, as the Secretary may prescribe, and will permit such audits and inspections of its books and records as the Secretary may request.

(3) Any amount of the contract price found as a result of such renegotiation to represent excessive profits shall, as directed by the Secretary,——

[fol. 905] (A) Deducted by —— —— (Contractor) — payments otherwise due to —— —— (Subcontractor) under this contract; or

(B) Be paid by —— —— (Subcontractor) directly to the Government, if paid to him; or

(C) Be eliminated through reductions in the contract price or otherwise.

(4) —— —— (Subcontractor) agrees that —— —— (Contractor) shall not be liable to —— —— (Subcontractor) for or on account of any amount paid to the Government by —— —— (Subcontractor) or deducted by —— —— (Contractor) from payments otherwise due under this contract, pursuant to directions from the Secretary in accordance with the provisions of this Article. Under its contract with the Government —— —— (Contractor) is obligated to pay or credit to the Government all amounts withheld by it from —— —— (Subcontractor) hereunder.

(5) —— —— (Subcontractor) agrees (a) upon direction of the Secretary, to include in any subcontract hereunder sections (1) to (6) inclusive of this Article, and (b) to make no subdivisions of any contract or subcontract for the purpose of evading the provisions of this section, and (c) to repay to the Government the amount of any reduction in the contract price of any such subcontract which results from renegotiation thereof by the Secretary, and which the Secretary directs —— —— (Subcontractor) to

withhold from payments otherwise due under such subcontract and actually unpaid at the time —— —— (Subcontractor) receives such direction.

(6) As used in this Article,——

(a) The term 'Secretary' means the Secretary of War or any duly authorized representative of the Secretary, including the Contracting Officer.

(b) The term 'subcontract' means any purchase order or agreement to perform all or any part of the work, or to make or furnish any material, part, assembly, machinery, equipment or other personal property, required for the performance of this contract, unless exempt under or exempted pursuant to Section 403 (i) of the Sixth Supplemental National Defense Appropriation Act of 1942 as amended by Section 801 of the Revenue Act of 1942.

(c) The terms 'renegotiate' and 'renegotiation' have the same meaning as in section 403 (b) of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended.

(d) The term 'this contract' means this contract as modified from time to time."

[fol. 906]

(e) (1) The Contractor agrees to make—subdivisions of any contract or subcontract for the purpose of evading the provisions of this Article.

(2) If any renegotiation between the Secretary and any subcontractor pursuant to the provisions required by section (d) hereof results in a reduction of the contract price or fixed-fee of the subcontract, the Government shall retain from payments otherwise due to the Contractor, or the Contractor shall repay to the Government, as the Secretary may direct, the amount of such reduction which the Secretary directs the Contractor to withhold from payments otherwise due to the subcontractor under the subcontract and actually unpaid at the time the Contractor receives such direction.

(f) As used in this Article:

(1) The term "Secretary" means the Secretary of War or any duly authorized representative of the Secretary, including the Contracting Officer.

(2) The term "subcontract" means (i) any purchase order or agreement to perform all or any part of the work, or to make or furnish any material, part, assembly, machinery, equipment or other personal property, required for the performance of this contract, or (ii) any contract or arrangement (other than a contract or arrangement between two contracting parties, one of which parties is found by the Secretary to be a bona fide executive officer, partner, or full-time employee of the other contracting party), (A) any amount payable under which is contingent upon the procurement of a contract or contracts with a Department or of a subcontract or subcontracts thereunder, or determined with reference to the amount of such a contract or subcontract or such contracts or subcontracts, or (B) under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a Department or a subcontract or subcontracts thereunder, unless exempt under or exempted pursuant to Section 403 (i) of the Sixth Supplemental National Defense Appropriation Act of 1942, as amended.

(3) The terms "renegotiate" and "renegotiation" have the same meaning as in section 403 (b) of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended.

(4) The term "this contract" means this contract as modified from time to time.

(g) If the Contractor makes any subcontract under this contract upon a fixed-fee basis, (i) for determining the application of section (d) the amount of said subcontract shall be deemed to be the estimated cost thereof plus the fixed-fee and (ii) there shall be substituted in paragraphs (1) and (3) of the Article to be inserted therein pursuant to section (d) the words "fixed-fee specified in Article ——" for the words "contract price."

Article 25—Approval

This contract shall be subject to the written approval of the Secretary of War or such individual as said Secretary may designate and shall not be binding until so approved.

[fol. 907]

1. The Contractor shall provide facilities and services when and as, during the period beginning November 1, 1943, and continuing to and including June 30, 1944, the Government, represented by the Contracting Officer, or the Commanding General, Air Service Command, or other competent authority, shall request and direct, necessary to accomplish the transporting, storing, handling and delivery of an estimated $3,150,000 gallons per month of Government-owned aircraft engine fuel, Grade 91, in the manner and at the following unit prices applicable to the various services described below:

a. Receiving into barges said fuel at the shipping points indicated below and transporting the same by barge to Contractor's terminal, West Nashville, Tennessee, at the unit price for all such barging on the lower Mississippi and Ohio Rivers of $0.00375 per net ton per mile and at the unit price for all such barging on the Cumberland River of $0.0041 per net ton per mile. For the purpose of determining the net weight of each barge load of such fuel the Standard Table of Conversion Factors for determining weight in relation to gravity as approved by the United States Bureau of Standards shall be employed, and Contractor's invoices shall show both gross and net weight computed as above. For the purpose of the movement of said fuel from any of the shipping points listed below the following, for payment purposes, shall be considered as the accepted mileage between the indicated points as determined by the Corps of Engineers:

Shipping Point	Distance from Shipping Point to Confluence of Ohio and Cumberland Rivers ($0.00375 per net ton per mile)	Distance from Confluence of Ohio and Cumberland Rivers to Contractor's Terminal, West Nashville, Nashville, Tennessee ($0.0041 per net ton per mile)	Total Mileage from Shipping Point to West Nashville, Nashville, Tennessee
Marrero, La.	1,032.0	183.7	1,215.7
Meraux, La.	1,044.3	183.7	1,228.0
St. Rose, La.	1,012.5	183.7	1,196.2
Destrahan, La.	1,009.5	183.7	1,193.2
Good Hope, La.	1,005.3	183.7	1,189.0
Baton Rouge, La.	899.4	183.7	1,083.1

[fol. 908] *b.* Unloading from barges into Contractor's terminal, West Nashville, Nashville, Tennessee, and loading from terminal into Contractor-furnished transport trucks and/or Government servicing units at said terminal at the through-put price of $0.0055 per gallon.

c. For transporting from Contractor's storage at West Nashville, Nashville, Tennessee, in Contractor-furnished transport trucks and delivering said fuel f.o.b. Government storage at such destinations as may be directed under the terms hereof, at the following unit prices:

Mileage	*Unit Price Per Gallon*
0 to 15	$0.003
16 to 50	$0.005
51 and over — for each 10 miles or fraction thereof	$0.001

Provided, however, that Contractor shall in no event transport fuel under this subparagraph *c.* for a distance in excess of 100 miles from Contractor's storage.

2. The Contractor shall provide for the flat use charge of $2,750.00 per month terminal facilities located on Centennial Boulevard, West Nashville, Nashville, Tennessee, consisting of one (1) 30,000 barrel storage tank, one (1) 10,000 barrel storage tank and four (4) 3,000 barrel storage tanks together with loading racks, pumps, pipe lines and other facilities incidental to the operation of said terminal, for the servicing of Government-owned aircraft engine fuel under the terms of this contract.

3. In the event that any transportation equipment or other facilities employed by the Contractor in performing the services called for hereunder are equipped with rubber hose, said hose shall be of a type resistant to aromatics in concentrations of up to forty per cent (40%).

4. As of the date of execution of this contract there has been allotted for it the total sum of $594,000.00. This sum may be increased from time to time by the Government solely in its discretion. Upon the making of any such increase, the Contracting Officer shall notify the Contractor in writing of the amount of such increase. Anything in this contract to the contrary, notwithstanding, the Government shall not be obligated to pay to the Contractor any amount in excess of said sum allotted for this contract, and Contractor shall not be obligated to perform services, which if performed would entitle the Contractor to payments in excess of said sum so allotted; provided, however, that if the Contractor performs services of the type called for in this contract for which funds are not allotted, the Contracting Officer may ratify such services when funds are allotted therefor.

Expedite in application
C- 19571
Class 06-A

CHANGE ORDER

ARMY AIR FORCES
Materiel Command
Wright Field, Dayton, Ohio

D

Date 19 April 1944
Change Order No. 1 to
Contract No. W 33-038 ac-1689

TO: River Petroleum Corporation, New Orleans, Louisiana
SUBJECT: Miscellaneous Change

1. Under authority contained in the First War Powers Act, dated December 18, 1941 (Public No. 354 - 77th Congress) and Executive Order No. 9001, dated December 27, 1941, permitting the amending or modification of contracts to carry out the purposes specified in said Act and Executive Order and in the performance of Contract W 33-038 ac-1689, the Contractor shall transport, store, handle and deliver Grade 130 Government-owned aircraft engine fuel as well as Grade 91 fuel as specified in Paragraph 1 of Exhibit "A" to said contract.

No change in contract consideration.

REASON: To expedite the War Program.

490

AAFMC 414-WF-9-14-42-20M

Cameraman'

This is po
is the bes

		fixed price	$ nothing
Total	increase	[redacted]	$
	decrease	[redacted]	$

Except as hereby amended, all the terms and conditions of the Contract affected shall remain unmodified and in full force and effect and shall also apply in carrying out the provisions of this Change Order.

UNITED STATES OF AMERICA

BY: .....
Contracting Officer

C. T. McDERMOTT, 1st LT., AIR CORPS

1ST INDORSEMENT

(Place) (Date)

TO: CONTRACTING OFFICER:

1. Contractor hereby accepts the above Change Order.

RIVER PETROLEUM CORPORATION (SEAL)
(Contractor)

BY: .....
(Signature of Official with Office held)

F.R.Redfern, Vice-Pres.

AFP No.: none

The supplies and services to be obtained by this instrument are authorized by, are for the purpose set forth in and are chargeable to the following allotments, the available balances of which are sufficient to cover cost of same:

none

Change Order No. 1 to Contract No. 33-038 ac-1689

Sheet 2

910

n's Note:

poor copy, but
est obtainable.

Supplement Agr nt No. _____
to Contract # _____

ANMB Preference 2 (8-6516)
~~55-058 AC-1689 (11563)~~

Classification ~~None~~

AFP ~~06-A~~

I. O. M. ~~64538C-A~~

General Procurement Section
Unit E, dated 11 July 1944

SUPPLEMENTAL AGREEMENT
TO
FIXED PRICE
CONTRACT

for

_____

(ARMY ~~AIR FORCES~~ SERVICES)

WAR DEPARTMENT

CONTRACTOR: GST/shm

SUPPLEMENTAL AGREEMENT FOR: RIVER PETROLEUM CORPORATION

CHANGE IN PRICE: Reimbursement for Certain Demurrage Expenses

Increase - Not to exceed [illegible]

Payments to be made by the Finance Officer, United States [illegible]

~~The supplies and services, if any, to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the allotments below enumerated under the heading "Debit", the available balances of which are sufficient to cover the cost thereof. The reduction, if any, in price under this instrument will result in credits to the allotments below enumerated under the heading "Credit".~~

Building 120 West Second Street, Dayton 2, Ohio.

Debit: ACA 1942-45, 502-5160 P 412-03 A 212/50705

SUPPLEMENTAL AGREEMENT TO
FIXED PRICE CONTRACT FOR SERVICES

THIS SUPPLEMENTAL AGREEMENT No. 2 (S-6516) to Contract No. W 33-038 ac-1689 (11563), entered into this 10th. day of August 1944, by and between THE UNITED STATES OF AMERICA, hereinafter called the "Government", represented by the Contracting Officer executing this Supplemental Agreement*, and RIVER PETROLEUM CORPORATION, a corporation organized and existing under the laws of the State of Louisiana, of the City of New Orleans, in the State of Louisiana, hereinafter called the "Contractor",

W I T N E S S E T H

WHEREAS, the Government and the Contractor have heretofore entered into Contract No. W 33-038 ac-1689, which contract, as the same may have been heretofore amended, modified and supplemented, is hereinafter called the "Service Contract", and pursuant to which the Contractor has agreed to furnish certain services in connection with the transportation, storage, handling and delivery of Government-owned aircraft engine fuel; and

WHEREAS, the Contractor incurred certain expenses in connection with the loading of Barge No. DPC-430X with Government-owned fuel at St. Rose, Louisiana; and

WHEREAS, the Contractor is entitled to be reimbursed for said demurrage charges and towing expenses under the provisions of Article 23 of the Service Contract;

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements herein contained and for other good and valuable considerations, the parties hereto agree as follows:

First: Pursuant to the provisions of Article 23 - Demurrage - of the Service Contract, the Government shall reimburse the Contractor for certain demurrage expenses incurred by the Contractor in connection with the movement of Barge No. DPC-430X during the period January 3, 1944, up to and including January 13, 1944, as follows:

(1) Demurrage charges for delay of 252.5 hours at the rate of $2.839737 per hour (based upon barge capacity of 9,465.79 barrels at the unit rate of $0.0003 per barrel) . . . . . $717.03.

(2) Services of the Tug "H. T. Debardeleben" in getting the Barge DPC-430X in the clear at the Coyles Yard, New Orleans, Louisiana . . . . . $ 15.63.

* This Supplemental Agreement was negotiated under the authority of the First War Powers Act, 1941, and Executive Order No. 9001, December 27, 1941.

(3) Services of the Tugs "J. W. Terry" and "H. T. Debardeleben" in towing Barge DPC-430X from Coyles Yard, New Orleans, Louisiana, to St. Rose, Louisiana . . . . . $106.00.

Total . . . . . $838.66.

Second: Exhibit "A" of the Service Contract is hereby amended by deleting the first sentence of Paragraph 4 of said Exhibit and substituting the following sentence in lieu thereof:

"As of the date of execution of Supplemental Agreement No. 2 there has been allotted for this contract the total sum of $594,838.66."

Third: Except as hereby modified, either expressly or by necessary implication, all the terms, covenants and conditions of the Service Contract shall remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto have executed this Supplemental Agreement as of the day and year first above written.

THE UNITED STATES OF AMERICA

Two Witnesses:

BY: /s/ Dean Sweeney

/s/ L. Sanders
L. Sanders

DEAN SWEENEY, Captain, Air Corps
Contracting Officer
(Official Title)

/s/ A. Bellande
A. Bellande

RIVER PETROLEUM CORPORATION
(Contractor)

NOTE: Type or print names under all signatures

BY: /s/ F. R. Redfern
F. R. Redfern Vice President

New Orleans, Louisiana
(Business Address)

I, Louis H. Yarrut, certify that I am the Secretary of the corporation named as Contractor herein; that F. R. Redfern who signed this Supplemental Agreement on behalf of the Contractor, was then Vice President of said corporation; that said Supplemental Agreement was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

/s/ L. H. Yarrut

[Corporate Seal]

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, , who signed this Supplemental Agreement for RIVER PETROLEUM CORPORATION , had authority to execute the same, and is the individual who signs similar agreements on behalf of this corporation with the public generally.

Contracting Officer

[fol. 915] DEFENDANT'S EXHIBIT No. 2

STATE OF TENNESSEE

State of Tennessee, Department of Finance and Taxation,
Nashville

George F. McCanless, Commissioner.
War Memorial Building.

Memphis Tenn. Mar 2nd 1943

Mr. R. L. Weakly, Director Gasoline Division, War Memorial Building, Nashville, Tennessee.

DEAR MR. WEAKLY:

The attached sheet will show the movement of Aviation Gasoline from the tanks of the Standard Oil Co. to the Naval Base out at Millington, commencing with first deliveries after February 18th, the date this tank was designated as a tank exclusively for the use of the U. S. Government.

The Standard Oil Co. now have two tanks for the exclusive use of Government stocks, some move by tank cars and some by Motor Transports to Nashville and Smyrna, Tennessee.

It is not exactly clear to me as just how you wanted reports of movements out of these tanks reported, whether to be inspected by us or for the unit receiving the gasoline to make a report to you direct.

This schedule "E" blank covers most of the information needed, except the number of the invoice.

Please advise us fully as just how to handle these reports, as so far we have made no other report save the one where stocks are received from the barges into these shore tanks, which we have made notation on these reports showing the tanks that they were for exclusive use of the U. S. Government.

Yours very truly, J. O. Johnson, Inspector.

[fol. 916] DEFENDANT'S EXHIBIT No. 3

March 5, 1943.

Mr. J. O. Johnson, Gasoline Inspector,
Department of Finance & Taxation,

Memphis, Tennessee.

DEAR MR. JOHNSON:

I have your letter with reference to aviation gasoline shipped from the tank of the Standard Oil Company marked for the use of the United States Government in which you ask how to handle the reports of these shipments.

Please be advised that it is not neeessary for you to handle these shipments in any way. This office is not concerned with the quantities shipped out of these tanks, but only with the quantities stored in them. In the future please keep up with the quantities received in these tanks and report it to this office on your regular forms and mark them in some way to identify them as tanks used exclusively by the United States Government.

Yours very truly, R. L. Weakley, Director, Gasoline Tax & Oil Inspection Division.

RLW:vs.

[fol. 917] DEFENDANT'S EXHIBIT No. 4

State of Tennessee, Department of Finance and Taxation,
Nashville (3)

George F. McCanless, Commissioner

War Memorial Building

December 16, 1943.

Standard Oil Company,
1211 Union Avenue,
Memphis, Tennessee.

GENTLEMEN:

I was discussing with Assistant Attorney General Barry and the Hon. George F. McCanless, Commissioner of Finance and Taxation, the matter of your storing gasoline

for the United States Government, and they instructed me to advise you to list all receipts of government owned gasoline stored by you on your monthly reports to this office on the schedules applicable to the method by which the substance was received or transported. You may list this along with receipts of your substance, or list these receipts on the schedule after you have already listed all receipts of your own substance, or on a separate schedule.

Yours very truly, R. L. Weakley, Director, Gasoline Tax & Oil Inspection Division.

RLW:vs.

[fol. 918] DEFENDANT'S EXHIBIT No. 5

Office of the
Attorney General
Supreme Court Building
Nashville 3, Tennessee

October 28, 1949

Hon. James Clarence Evans, Commissioner
Department of Finance & Taxation
Nashville, Tennessee

Re: Storage of Government Gasoline at Memphis by Standard Oil Company during War Period

Dear Commissioner Evans:

I have your letter of October 26 requesting that I examine the files of this office to ascertain whether or not there was any contract or correspondence between officials of the State of Tennessee and the Standard Oil Company which would operate as a waiver of the State's regulation against the commingling of Government-owned gasoline with commercial stock, or which permitted the Standard Oil Company to store Government-owned gasoline and their own commercial stock in the same storage tanks at Memphis during the war period.

I have examined the entire gasoline tax files of this office for the period in question, which would also include any correspondence which I might have had upon the subject, and I am unable to find anything directly in point upon this particular question. My file, of course, shows that no question has been raised during the years as to the right of the Federal Government to purchase and use tax-exempt gasoline in Tennessee in carrying out the functions of the National Government. This, of course, is under the authority of the decisions of the Supreme Court of the United States, and also under the Tennessee statute, Chapter 117 of the Public Acts of 1941, which was held to include the United States Government by an opinion rendered by this office on July 28, 1942 to Hon. George F. McCanless, Commissioner of Finance and Taxation.

During the early period of the War this office and the Department of Finance and Taxation recognized the right of the Federal Government to purchase and store tax-exempt gasoline in this State in storage tanks owned by the Federal Government, and also, in many instances, in storage tanks leased by the Federal Government. It is my recollection that as the war progressed the steel or storage tank shortage became more acute, as well as the [fol. 919] transportation problem in the distribution of gasoline. Mr. Weakley, in his usual efficient manner, kept abreast at all times of the method in which the Federal Government, particularly the Army and Navy, and the oil companies were handling gasoline. From time to time he advised Commissioner McCanless and me of any change in their methods.

Although my files reflect nothing upon the subject, I believe both Commissioner McCanless and Mr. Weakley will confirm my impression that at some stage of the war period we had information and knew that some of the oil companies were commingling Government-owned gasoline with their own commercial stock. Mr. Weakley's letter of December 16, referred to in your letter, appears to confirm this fact.

During the war period, when the Army, Navy and other instrumentalities of the Federal Government were carrying on such extensive operations in the State, the ques-

tions of intergovernmental taxation were exceedingly complex and difficult and the Department of Finance and Taxation and this office had innumerable conferences and much correspondence with representatives of the Federal Government, and also representatives of corporations engaged in various phases of war work.

From a limited recollection of this particular matter, I believe that you will find, after examining all the files and discussing it with former Commissioner McCanless and Mr. Weakley, that the said commingling of Government-owned gasoline was known to the proper State officials at the time and that no action was attempted to be taken, either in the form of a waiver or in an effort to enforce gasoline tax collections measured by storage and without reference to Government ownership.

Very truly yours, W. F. Barry, Solicitor General.

WFB/d.

Copy to: Hon. George F. McCanless, Attorney, Morristown, Tennessee. Mr. R. L. Weakley, Gasoline Tax Division, Department of Finance & Taxation, Nashville, Tennessee.

[fol. 920] DEFENDANT'S EXHIBIT NUMBER 6

October 26, 1949

Honorable W. F. Barry, Solicitor General, Supreme Court Building, Nashville

Dear GENERAL BARRY:

I believe that I have suggested to you that we have been investigating the matter of the tax liability of Standard Oil pertaining to gasoline ultimately distributed by them to various Government Agencies, but which was received and stored at Standard's Memphis Terminals and there commingled in tanks with other gasoline which would not go to the Government.

We have searched the records of the Department and can find nothing to indicate that any sort of a waiver or representation of a future waiver was extended to Stand-

ard, nor can we find any written request by either Standard or the Government for such a waiver.

We have written former Commissioner McCanless and, noting quite properly that his memory might not be clear at this late date, he advised "that we required that all gasoline sold to the government be segregated and kept in separate storage as a condition to tax exemption. I think this must have been so because Mr. Weakley's office handled the reports and he would have known it if any other method of handling had been allowed and, also, the companies would have insisted that they be given letters granting them exemption on Government sales from general storage if it had been granted them".

We have a letter of December 16 signed by Mr. Weakley addressed to Standard stating that he had discussed the question with Mr. McCanless and with you. Mr. Weakley states that to the best of his recollection he discussed it with you two separately. In his letter to Standard he states ". . . they instructed me to advise you to list all receipts of government owned gasoline stored by you on your monthly reports to this office on the schedules applicable to the method by which the substance was received or transported. You may list this along with receipts of your own substance, or list these receipts on the schedule after you have already listed all receipts of your own substance, or on a separate schedule".

[fol. 921] Mr. Weakley now explains to me that he has been convinced from the beginning that Standard was liable on all commingled gasoline, and that he wrote this letter of December 16 to make certain that, if and when a definite opinion with definite instructions were given to him, he would be in a position from his records to compute the tax.

We have talked with Bill Waller, representing Standard, and he has furnished us with letters indicating that copies of the contract between the Government and Standard pertaining to this gasoline were furnished to Commissioner McCanless. Mr. Weakley says that he never saw those contracts and we have found none in the Department. Bill Waller has recently furnished us with photostats. However, Waller has not furnished us with any evidence

that any sort of an exemption was ever granted. He has furnished us with a letter which he addressed to Mr. Weakley dated February 23, 1943, in which he stated "It is my understanding that the State of Tennessee does not intend to collect the Tennessee gasoline tax and inspection fee on such gasoline. Standard Oil Company of Louisiana is concerned . . . and would appreciate a ruling on this point. . . ."

We want to be entirely fair with Standard Oil and make certain that we are not estopped by any action which the Department has taken heretofore. Will you please advise whether you have anything in your files, or can recall anything which would amount to the granting of an exemption or a waiver by the Department in this matter.

I have outlined the above in detail so as to give you every possible assistance in refreshing your own recollection.

Very truly yours, James Clarence Evans, Commissioner. JCE:mws

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 330

ESSO STANDARD OIL COMPANY,

Appellant,

vs.

JAMES CLARENCE EVANS, COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE, ET AL.

APPEAL FROM THE SUPREME COURT OF TENNESSEE

STATEMENT AS TO JURISDICTION

WILLIAM WALLER,
Counsel for Appellant.

WALLER, DAVIS AND LANSDEN,
Of Counsel.

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United States v. *Allegheny County*, 322 U.S. 174
Wheeling Steel Corp. v. *Glander*, 337 U.S. 562
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STATUTES AND OTHER AUTHORITIES CITED

Constitution of the United States, Fourteenth Amendment
Executive Order Number 9001, dated December 27, 1941
First War Powers Act, 1941 (Act of December 18, 1941, P. L. 354, C. 593, Title II, Section 201, 55 Stat. 839)
Tennessee Code of 1932, Sections 1126 through 1147 (The Official Code of Tennessee, pages 278 through 283, as amended by Chapter 40, Acts of 1931, Chapter 130, Acts of 1933, Chapter 202, Acts of 1937, and Chapter 50, Acts of 1943)
United States Code, Title 28:
Section 1257(2)
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IN THE SUPREME COURT OF THE STATE OF TENNESSEE

Davidson Equity

ESSO STANDARD OIL COMPANY,
Complainant-Appellant,

vs.

JAMES CLARENCE EVANS, COMMISSIONER, ETC.,
Defendant-Appellee

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the rules of the Supreme Court of the United States, as amended, complainant-appellant submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court of Tennessee entered in this cause.

I

Opinions Below

The opinions below have not been reported. The opinion of the Supreme Court of Tennessee filed June 7, 1952, will be reported in 194 Tennessee. Copy of same is attached hereto as Appendix A. Copy of the opinion on petition to rehear filed July 11, 1952, is attached hereto as Appendix

B. Copy of the opinion of the Chancellor is attached hereto as Appendix C.

II

Jurisdiction

The judgment of the Supreme Court of Tennessee was entered June 7, 1952. Petition to rehear was seasonably filed June 16, 1952, was entertained, and was denied July 11, 1952. A petition for appeal is presented to the Supreme Court of Tennessee herewith, to wit, on August 8, 1952. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, United States Code, Sections 1257(2) and 2101(c).

III

Tennessee Statutes Involved

The statutes of Tennessee, the validity of which is involved, are Sections 1126-1147 of the Code of Tennessee (1932) found at pages 278-283 of the Official Code, as amended by Chapter 40, Acts of 1931, Chapter 130, Acts of 1933, Chapter 202, Acts of 1937, and Chapter 50, Acts of 1943. The pertinent portions of these statutes as found in Williams Tennessee Code, Annotated, are included herein as Appendix D, except that Chapter 50, Acts of 1943, is copied in its original form.

IV

Nature of the Case

This case involves the validity of the seven cents per gallon Tennessee gasoline tax statutes as applied to aviation gasoline purchased by the United States at various refineries and transported by it, by common carrier river barges to Memphis, Tennessee, where it was stored in tanks, pending orders for the gasoline from various airfields in

Tennessee, Mississippi and Arkansas. The validity of said statutes was drawn in question on the ground of being repugnant to the Constitution of the United States and the decision of the Tennessee Supreme Court was in favor of their validity. Reference is made to the assignment of errors filed in connection with this appeal, attached hereto as Appendix G.

Under the provisions of the First War Powers Act, 1941 (Act of December 18, 1941, P. L. 354, C. 593, Title II, Sec. 201, 55 Stat. 839), and Executive Order No. 9001, December 27, 1941, the War Department, commencing in 1943, entered into successive contracts with Standard Oil Company of Louisiana for the storage and handling of this government owned aircraft engine fuel. Some of the tanks used for such storage were owned by Standard Oil Company of Louisiana (subsequently merged into Esso Standard Oil Company, formerly Standard Oil Company of New Jersey), hereinafter for convenience referred to as "Esso," and some of the tanks were leased by Esso from Lion Oil Refining Company for the purpose of storing such gasoline. The applicable contracts for the month of January, 1944, are complainant's Exhibit 1, relating to the tanks at Memphis owned by Esso, complainant's Exhibit 2, relating to the tanks at Memphis leased by Esso from Lion Oil Refining Company and complainant's Exhibit 3, relating to storage of a relatively insignificant quantity of gasoline at Knoxville.

During said month 2,840,529 gallons of aviation gasoline were received into storage in the tanks at Memphis (both the tanks owned by Esso and the tanks leased from Lion Oil Refining Company); 743,824 gallons from Esso's tanks were transported to the 70th Sub-Depot at the Memphis Municipal Airport by Esso in its own tank trucks; and 1,754,712 gallons from Esso's tanks were delivered to common carrier trucks to be transported to various airfields in

Tennessee, Arkansas, Mississippi and Alabama. The total service charge billed by Esso to the United States on the gallonage delivered during the month from its own tanks was $10,174.11, being at the rate of $.0066 per gallon for gasoline delivered to the Memphis Municipal Airport in its own trucks and $.0030 per gallon for gasoline delivered to common carrier trucks (Complainant's Exhibit 36). These charges were fixed in Exhibit A-1 to the service contract relating to the use of Esso's tanks (Complainant's Exhibit 1). During the same month there were delivered from the tanks leased from Lion Oil Refining Company 238,182 gallons, all to common carrier trucks for transportation to airfields in Arkansas, Mississippi and Missouri, and the service charge on this gasoline was $.0018 per gallon or $428.73 (Complainant's Exhibit 37). This was the charge fixed in Exhibit A to the applicable service contract (Complainant's Exhibit 2). There was also a monthly use price of $450.00 for these tanks,—the exact amount paid by Esso to Lion Oil Refining Company (Complainant's Exhibits 2 and 34). During the same month there were deliveries of 28,334 gallons of gasoline at Knoxville for which a charge of 6.20¢ per gallon was made,—this gasoline being delivered into the tanks of the airplanes (Complainant's Exhibits 3 and 38).

Each contract provided for the reimbursement by the United States to Esso of local excise taxes to the extent that proof of exemption was not acceptable to the taxing authorities, but with the provision that the Government might litigate the liability for any such taxes in the name of the Contractor (Article 18 of Complainant's Exhibits 1, 2 and 3).

Information reports were made by Esso to the State of Tennessee with respect to all government owned gasoline stored and handled pursuant to these contracts. No

attempt was made by the State to tax this gasoline until 1949 when a new Commissioner of Finance and Taxation caused retroactive assessments to be made. By this time the statute of limitations had barred the year 1943. Esso, which was a qualified gasoline distributor under Tennessee law, was required to pay under protest the taxes, interest and penalties for January, 1944, as well as inspection fees, after threat of the issuance of distress warrant, and on instructions of the United States, Esso filed suit to recover. Failure to have paid the sum demanded would have resulted in the revocation of Esso's permit as gasoline distributor (Code sec. 1146).

The Chancery Court held that because of the delay and because Esso had been led to believe that there was no liability for the tax, it was inequitable to assess interest and penalties. The Court gave Esso judgment for the amount paid under protest which represented interest and penalties. The Court further held that the inspection fees were not properly assessed and gave Esso judgment for the amount of the sum paid under protest which represented such inspection fees. The Court held that the seven cents per gallon gasoline tax was properly assessed; that there was no implied constitutional immunity because the gasoline was the property of the United States; and that Esso should not recover that part of the sum paid under protest which represented such taxes. The Supreme Court of the State affirmed the lower court and denied petition to rehear in which it was contended that the statutes found to be applicable, as construed and applied, denied to Esso the equal protection of the laws, contrary to the Fourteenth Amendment of the United States.

V

Rulings of the Court and Stage of Proceedings Where Federal Questions Raised

In its original bill (R. 291-308) Esso expressly relied upon the principle of implied constitutional immunity. The United States intervened and adopted these allegations (R. 319-321). The Chancery Court ruled adversely to this contention (Exhibit C). The question was preserved by assignments of error made by Esso on appeal which were also adopted by the United States. These assignments of error are attached hereto as Appendix E. The Supreme Court of Tennessee ruled adversely to Esso and the United States on the constitutional immunity issue (Appendix A).

The equal protection of the laws clause of the Fourteenth Amendment was first relied upon in the petition to rehear. Copy of same is attached hereto as Appendix F. The Supreme Court of Tennessee entertained the petition to rehear, and while it did not expressly mention the Fourteenth Amendment, stated that the contention made was a "re-argument" (Appendix B). The reason the Fourteenth Amendment was not previously relied upon was that in no prior decision had the Supreme Court of Tennessee held that the gasoline tax could be assessed against anyone other than the owner of the gasoline. In the only prior case in which an attempt had been made to assess the tax against a bailee, the Court had decided against the State, saying: "The determinative question is: To whom does the gasoline belong when it comes to rest in the State of Tennessee?" (*Tennessee Oil Company* v. *Commissioner*, 173 Tenn. 683, at page 691). It was to be assumed that the Court would either overrule this case or apply it. Actually the Court adhered to its decision in

the Tennessee Oil Company case, but at the same time affirmed the lower Court, (which had ignored the Tennessee Oil Company case in its opinion), on the ground that the Tennessee Oil Company case was distinguishable on facts other than the ownership of the gasoline at the time it came to rest in the State of Tennessee.

Since the constitutional immunity question was expressly passed upon by the Supreme Court of Tennessee adversely to appellant's contention, and the validity of the statutes sustained, the Supreme Court has jurisdiction to review this case on appeal. *Charleston Federal Savings & Loan Assn.* v. *Alderson;* 324 U. S. 182, 185-6. Since this issue was appealable, the Supreme Court as jurisdiction to review the Fourteenth Amendment issue even if it were not itself appealable. *Flournoy* v. *Wiener;* 321 U. S. 253, 263. The decision of the Supreme Court of Tennessee in adhering to the decision in *Tennessee Oil Company* v. *Commissioner, supra,* and at the same time affirming the Chancery Court in the case at bar, was a surprise and could not have been reasonably anticipated from prior decisions. Hence it was not too late to raise the Fourteenth Amendment question in a petition to rehear. *Herndon* v. *Georgia,* 295 U. S. 441; *Great Northern Railway* v. *Sunburst Co.,* 287 U. S. 358, 367; *Saunders* v. *Shaw,* 244 U. S. 317.

The Questions Raised Are Substantial

The Supreme Court of Tennessee, in holding that the principle of implied constitutional immunity did not apply, relied mainly upon *Alabama* v. *King & Boozer,* 314 U. S. 1, and *Curry* v. *United States,* 314 U. S. 14. In these companion cases sales taxes and use taxes were upheld where assessed to cost-plus contractors with the United States on the privilege of purchasing and using property which subsequently became the property of the United States.

The legal incidence of the tax was held to be on the contractor in each instance and the property involved was found to have been purchased by the contractor and not by the United States. The fact that the property subsequently became the property of the United States was held to be immaterial.

In the case at bar, on the other hand, the gasoline which was the measure of the tax was at all times the property of the United States.

In relying upon the King & Boozer and Curry cases, the Supreme Court of Tennessee apparently treated as controlling the statement by Mr. Chief Justice Stone in the opinion in the latter case that "the constitution, without implementation by Congressional legislation, does not prohibit a tax upon Government contractors because its burden is passed on economically by the terms of the contract or otherwise as a part of the construction cost to the Government." In United States v. Allegheny County, 322 U. S. 174, there was no Congressional legislation to implement the constitution. Nevertheless, the Supreme Court held that a tax levied against Mesta Machine Company, lessee of machinery owned by the United States, was invalid where measured in part by the value of such machinery.

The Supreme Court of Tennessee distinguished the Mesta case on the theory that it involved "an ad valorem tax on personal property of the United States." Actually the assessment was made to Mesta Machine Company and no attempt was made to collect the tax from the United States. The tax was held invalid because the property by which the tax was measured was the property of the United States. The Supreme Court regarded substance rather than form and treated the tax as one on the property of the United States only because it was measured by that property. The United States was a party to the case only as intervenor, as is true in the case at bar. In the Mesta

case the tax was actually levied against the lessee, and in the case at bar against the bailee, of property belonging to the United States.

While the distinction between an ad valorem tax and an excise tax or privilege tax may be important as a matter of Tennessee law, it is of no significance where constitutional immunity is involved. The "practical operation and effect" of the tax is determinative. See New Jersey Realty Title Insurance Company v. Division of Tax Appeals, 338 U. S. 665, at page 673.

The "setting of the applicable legislation and the particular exaction" (Mayo v. United States, 319 U. S. 441, 447-448) is such that the silence of Congress with reference to the Tennessee gasoline tax on this aviation gasoline has no significance. The contracts between the Government and Esso were made under the provisions of the First War Powers Act, 1941. When this legislation was enacted, and until 1949, when the assessments here in controversy were made, Congress had no intimation of any intention on the part of Tennessee to levy a seven cents per gallon tax on aviation gasoline, owned by the United States, merely because it was temporarily stored in tanks owned or leased by a company which had qualified as a gasoline distributor under Tennessee law.

If knowledge of state law is to be imputed to Congress, the construction of the Tennessee statutes by the Supreme Court of Tennessee (prior to the decision in the case at bar) was that the tax could be levied against no one but the owner. Tennessee Oil Company v. Commissioner, 178 Tenn. 683 (decided December 13, 1941). Moreover, the express language of Code secs. 1126 and 1127 seemed to preclude the assessment to a distributor of the tax on gasoline which had not been either manufactured or refined in Tennessee or imported into Tennessee by the distributor. In the case at bar the Supreme Court of Tennessee held

(Appendix A) that it was "unnecessary to decide" whether the statutes so provided "since technically Esso did import the gasoline into Tennessee by removing it from the channels of interstate commerce on the barges on the river into its trucks and tanks on the bank." When the attention of the Court was called in petition to rehear to the proposition that removal from barges on the shore to tanks on the bank did not constitute importation, the Court said (Appendix B) that in the former opinion "we held that it was unnecessary to a decision, to decide whether or not Esso had imported the gasoline, and expressly so stated." The Court then quoted the language above quoted from the former opinion,—an unexplained contradiction. Congress could not have anticipated such a decision.

In the King & Boozer case the Supreme Court said that the tax upheld was non-discriminatory. If the Tennessee gasoline tax is not applicable under the Tennessee Oil Company case, because the distributor did not own the gasoline, but is applicable in the case at bar where the distributor did not own the gasoline, and the United States did own it, then the Tennessee gasoline tax cannot be said to be non-discriminatory.

The Supreme Court of Tennessee said: "We observe that any liability of the United States, under our decision, is the result of private contract with Esso, and not the result of State action." This was equally true in the Mesta case. It is also significant that when the contracts with Esso were made covering January, 1944, and succeeding periods, the statutes now involved were in full force and effect; the State was fully advised as to the facts; and although the tax statutes required monthly assessments of the gasoline tax, no assessments were being made or had been made notwithstanding the fact that, with full knowledge of the State, gasoline was being stored and handled in the same manner throughout most of 1943. The Army officer who

was initially responsible for the contracts testified (R. 530-531) that he would not have made them except on the understanding that the tax was not required to be paid. The United States cannot be charged with a deliberate assumption of liability for this tax which was not assessed until 1949.

If the contracts with the United States are to be held irrelevant, on the constitutional immunity question, the equal protection of the laws clause of the Fourteenth Amendment is applicable. Under the doctrine of Tennessee Oil Company v. Commissioner, supra, the tax is not required to be paid by a distributor who stores and handles gasoline for the owner at a charge of two cents a gallon plus a charge of $1.00 for the use of the tanks. Under the doctrine of the case at bar the tax is required to be paid where the distributor stores and handles the gasoline for a charge of a fraction of a cent per gallon, with no extra charge for the use of its own tanks and a charge of $450.00 per year for the tanks leased by the distributor from another distributor. This is an arbitrary clasification without reasonable or substantial basis. "The state action, which is reviewable under the Fourteenth Amendment, is the composite result of both legislation and its judicial interpretation". *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562, at page 570. Esso has been selected "for discriminatory treatment" and has been denied "the right to equal treatment." *Hillsborough* v. *Cromwell*, 326 U. S. 620, at page 623. See also *Snowden* v. *Hughes*, 321 U. S. 1; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389; *Schlesinger* v. *Wisconsin*, 270 U. S. 230; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

The arbitrary and discriminatory character of the statutes involved, as construed and applied in this case, is further demonstrated by the refusal to make allowance for 1,005,832 gallons of gasoline exported to other states by

common carrier, as provided in Chapter 50, Acts of 1943. In the opinion denying the petition to rehear (Appendix B) the Court treated the information reports made by Esso at the request of the Department of Finance and Taxation as tax returns, although not accompanied by any payment of tax under Code Section 1135, and held that because Esso failed to claim exemption for the tax on the exported gasoline, at a time when the State was treating all government owned gasoline as exempt, it lost its right to claim the exemption when the assessments were made several years later.

This case involves a substantial sum of money. For January 1944 the seven cents per gallon tax was assessed on 2,840,529 gallons, making a tax of $198,837.03. While this case involves only the month of January, 1944, the validity of the statutes as applied to gasoline similarly handled in succeeding months of World War II will depend upon the decision of this case. The taxes assessed for the remainder of 1944, 1945 and for the first six months of 1946 aggregated $3,818,212.16, exclusive of interest, penalties and inspection fees (R. 297). In sustaining the tax for the month of January, 1944, it is submitted that federal constitutional questions of great importance have been decided by the Supreme Court of Tennessee and that the decision of the State Court was not in accord with applicable decisions of the Supreme Court of the United States.

Respectfully submitted,

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APPENDIX A

For Publication. Gailor, J. Filed June 7, 1952

SUPREME COURT OF TENNESSEE, MIDDLE DIVISION AT NASHVILLE

DAVIDSON EQUITY

ESSO STANDARD OIL COMPANY

v.

JAMES CLARENCE EVANS, Commr., etc.

Honorable Thomas A. Shriver, Chancellor

AFFIRMED—Filed June 7, 1952

Waller, Davis & Lansden, for appellant.
Walker & Hooker, Cummings & Crabtree for appellee.

FRANK H. GAILOR,
Justice.

DAVIDSON EQUITY

ESSO STANDARD OIL COMPANY

v.

JAMES CLARENCE EVANS, Commr., etc.

OPINION

The bill in this cause was filed to recover certain gasoline taxes paid under protest by the Complainant on demand of the Defendant. In the Chancery Court, because certain governmental immunity was asserted, the Chancellor permitted the United States Government to file an intervening petition. For brevity and to conform with the method adopted by the parties, we will refer, in this opinion, to the Complainant as "Esso;" to the Defendant as "State;" and to the intervenor as the "United States."

The controversy rises out of services performed by Esso for the United States under written contracts which are exhibited. These contracts between the United States and Esso contained indemnifying clauses which provide for payment by the United States of any state taxes for which Esso may be made liable on account of its activities under the contracts.

During the war years the United States was purchasing at the refineries, all 100-octane and higher octane gasoline used in aviation. From the refineries, the gas was moved, usually by common carrier, and principally by river barge, to various storage points. The United States had no storage facilities nor personnel to store and handle the gasoline, and for these services contracted with private corporations.

Esso owned certain storage tanks at Memphis, and rented others from the Lion Oil Company, and then contracted with United States to store the aviation gasoline belonging to the United States, in these tanks, and with Esso personnel to distribute the gas from these tanks on order of the United States.

The gasoline came up the Mississippi River by barge from Louisiana, where it had been purchasd by the United States. When it arrived at Memphis, and while it was still on the barges, it was inspected by State officers, and thereafter pumped by Esso from the barges into its storage tanks, or in some cases, into tank trucks, and thereafter delivered to various Army posts on order of the United States. Some of these Army posts were in Tennessee, and others were in Arkansas and Mississippi.

Activity under the contracts here involved, commenced in 1943, and continued through the years 1944, 1945 and 1946. Since the Statute of Limitations had run on any taxes which accrued for the year 1943, the present suit was filed to recover taxes in the amount of $295,810.10, which had been paid under protest for the month of January 1944, after the State had prepared a distress warrant and threatened to have it served. It is agreed that the present suit is a test case, and will determine liability for taxes for the balance of the year 1944, and for the years 1945 and 1946. During the years when the contracts were in opera-

on and Esso was rendering its services to the United tates, inspection reports were rendered the Department f Finance and Taxation, and discussions were had with he State regarding tax liability. No formal decision of uch liability was ever made, either by the then Commis-ioner, or by the Attorney General. Esso insists that it elied on the contemporaneous and continued administra-ive construction of the then officers of the State, and that hey concluded that Esso was not liable for any gasoline axes in connection with the gasoline of the United States pon which Esso was rendering services under its con-racts. The State, on the other hand, insists that the mat-er of liability was held in abeyance and was uncertain, and hat Esso was never formally advised by any responsible uthority, that it was not liable for these taxes.

Under the contracts, Esso received as compensation, mounts ranging from 18/100 of a cent to 6-3/10 cents a allon for receiving and storing in its own facilities and hose leased from others, the gasoline belonging to the Jnited States. Also it received varying amounts for gaso-ne distributed by its own facilities, or delivered to car-iers on order of the United States.

From this, we conclude that the questions presented for ecision by this litigation are three, namely:

(1) On the facts stated, was Esso liable for inspection fees under Code sec. 6821?

(2) Was Esso liable for privilege tax for such operations under Code sec. 1126.1, et seq.?

(3) Was Esso liable for interest and penalties?

The Chancellor held that Esso was not liable for (1) and 3), but was liable for (2), and from those parts of the de-ree which were adverse, all parties have perfected ap-eals.

We consider first, the question of liability of Esso under Code sec. 6821, for the inspection fees. That section pro-ides that every consignment of volatile substances, as uch substances, are defined in previous sections of the Code, shall be inspected, and for such inspection, a charge hall be made to "the consignor or consignee," of 20 cents barrel. Fifty gallons shall constitute a barrel, and the ull charge made for any fraction of such barrel.

That this inspection fee is not merely a service charge, but is a revenue measure and an excise tax on the commodity, has been held in a number of our reported cases. State, ex rel Fort v. City of Jackson, 172 Tenn., 119; Texas Co. v. McCanless, 177 Tenn., 238.

From Judge Cook's discussion of the nature of the tax and its purpose in State v. Reed Oil Co., 176 Tenn., 10, 19-20, it is clear that the tax is laid upon the commodity itself, as an excise. In the present case, the gasoline, while it was in the barges on the river, and also while it was in the storage tanks on the bank, was admittedly the property of the United States. The inspections were made before the contract of Esso came into play, and before Esso had pumped the gasoline from the barge into its storage tanks. We, therefore, agree with the Chancellor, that the State has no power to levy a tax on property of the United States under these admitted facts.

We come next to the consideration of the second question, and Esso's liability for the privilege tax under Code secs. 1126, et seq. This privilege tax has also been defined by reported decisions of this Court.

> "This case (Foster & Creighton Co. v. Graham, 154 Tenn., 412) . . . settled the proposition that the tax . . . is a privilege tax on the engaging in the business of storing gasoline based on the number of gallons in storage." Texas Co. v. Fort, 168 Tenn., 679, 687.
>
> "Chapter 58, Tennessee Public Acts, 1923, as amended by chapter Tennessee Public Acts, 1925, is said, by its caption, to impose a privilege tax 'on persons . . . and corporations engaged in or carrying on the business . . . of selling or storing or distributing gasoline.' . . . . Storage of the gasoline and withdrawal of it from storage within the State for use or sale, are, as the State Supreme Court has held, the event which, by the very terms of the statute, call it into operation. Foster & C. Co. v. Graham, 154 Tenn., 412; Quick Service Tire Co. v. Smith, 156 Tenn., 102." N. C. & St. L. RR. Co. v. Wallace, 288 U. S., 249, 265, 77 L. ed., 737.

Esso contends that it is a condition precedent to liability for this tax, that the taxpayer shall have imported the gasoline. While we find no support for this argument in the cases cited above, in the present case, it is unnecessary to decide that question since technically Esso did import the gasoline into Tennessee by removing it from the channels of interstate commerce on the barges on the river into its trucks and tanks on the bank.

Further, Esso insists that the decision in Tennessee Oil Co. v. McCanless, 178 Tenn., 683, relieves it from liability in the present case. We find that case clearly distinguishable on the facts. In that case, the Obion County Board of Education rented a storage tank from the Tennessee Oil Company, with an agreement that it would pay the Tennessee Oil Company a fee of two cents a gallon for distributing the gas on order of the Board. In legal effect, the Board of Education, which was exempt, was storing gasoline in its own tank. Although the rental of the storage tank was a nominal amount, it had the effect of changing the status of the Tennessee Oil Company from that of an independent contractor to that of an agent or servant of the Board. In the present case, the charge which Esso made the United States for storage alone, was a very substantial and lucrative business considering the vast amount of gasoline involved, since the contracts show that Esso charged from 18/100 of a cent to 6-3/10 cents per gallon for receiving and storing the gasoline in its tanks. This was particularly true, as the state insists, since at the time of these contracts the United States owned all gasoline of this quality, and without this Government business, Esso would have had no lucrative return on its tanks, and made no money with which to pay its personnel.

We conclude, therefore, that Esso was properly assessed with privilege taxes defined in Code Sec. 1126, et seq.

Esso further insists that some of the gasoline received in the Memphis tanks was later, on order of the United States, exported to Mississippi and Arkansas. As to the exported gasoline, it is insisted that if liable at all for the privilege tax, it is liable only for the tax at the export rate of 1/20 of one cent per gallon. Esso kept no figures of the amount of

the exported gasoline, and made no return showing those figures to the Department of Finance and Taxation, as the law requires. Apparently, it is impossible at this point, to establish with any accuracy, what those figures were. Since, under the frame of the Act, the assessment for the tax is made on the returns of the taxpayer, and since the taxpayer is claiming the exemption, the burden was on the taxpayer to show the exact amount of the gasoline exported, in order to avoid the higher rate. Hamilton Natl. Bank v. McCanless, 176 Tenn., 570; Fidelity-Bankers Tr. Co. v. McCanless, 181 Tenn., 476.

As to Esso's insistence that by reason of the fact that the State made no demand for the taxes when they became due, and that State officers acquiesced in the non-payment of taxes, that the State is now estopped and precluded from collecting the taxes, it is only necessary to say that there was never any formal remission of these taxes by any responsible authority, and there is substantial evidence in the record that the matter of taxability was held in abeyance and never decided. In any event, it is general law (31 C. J. S., Estoppel, p. 412, Sec. 140-b), which has many times been followed by this Court; Natl. Life & Acc. Ins. Co. v. Dempster, 168 Tenn., 446; Reynolds Tobacco Co. v. Carson, 187 Tenn., 157; American Bemberg Corp. v. Carson, 188 Tenn., 263; that a mistaken construction of the law by a public officer cannot work an estoppel against the State in the collection of its revenue. The record does not show that Esso was prejudiced in any way by a failure to collect the tax. State v. McPhail, 156 Tenn., 459, 460.

Finally, we consider the third question, and the assignment by the State, that the Chancellor committed error in remitting interest and penalties on the taxes. Under the facts of this case, where there had been no formal demand by collectors at the time the taxes were due, and when there was a bona fide doubt of tax liability, the remission of interest and penalty was within the sound discretion of the Chancellor on principles of equity; Brewing Co. v. Currier, 126 Tenn., 535, where at page 551 of the opinion, Judge Green cites with approval, the following statement from Cooley on Taxation:

"... the penalty should not be exacted if the delay came from serious doubt of the validity of the tax." (Cooley on Taxation, Vol. 2, p. 901.)

"This controversy is being waged in a court of equity and this Court, since East Tenn. Brewing Co. -vs- Currier, 126 Tenn., 535, has exercised the power of remitting penalties imposed upon taxpayers when the equities of the case seem to demand. See also Shipp -vs- Cummings, 158 Tenn., 526, and State et al. -vs- Rowan et al., 171 Tenn., 612." Memphis Nat. Gas Co. -vs- McCanless, 180 Tenn., 695, 705-706.

From the foregoing authorities, we conclude that the matter of the remission of interest and penalty was within the sound discretion of the Chancellor, and on the facts of this case, we find no abuse of that discretion.

Finally, we consider the intervening petition of the United States and its assertion of "implied immunity." We observe that any liability of the United States, under our decision, is the result of private contract with Esso, and not the result of State action. In argument, it was stated by counsel for the United States, that the authority upon which insistence for immunity is based, is the decision of the Supreme Court of the United States in *U. S.* v. *Allegheny County*, 322 U. S., 174, 88 L. ed., 1209. Since we have held that Esso was only liable for the privilege tax under Code sec. 1126 et seq., and since the only tax involved in *U. S.* v. *Allegheny County, supra*, was an ad valorem tax on personal property of the United States, we do not find that case in point here. That Esso was liable for the privilege tax for doing business in the State, though that business was done entirely with property of the United States is settled, we think, by *James* v. *Dravo Contracting Co.*, 82 L. ed., 125; *State of Alabama* v. *King & Boozer*, 86 L. ed., 3; *Curry* v. *U. S.*, 86 L. ed., 9. In the course of

the last opinion, which was by Mr. Chief Justice Stone, it was said:

> "As pointed out in the opinion in the King & Boozer case, by concession of the government and on authority, the constitution, without implementation by Congressional legislation, does not prohibit a tax upon Government contractors because its burden is passed on economically by the terms of the contract or otherwise as a part of the construction cost to the Government." *Curry* v. *U. S.*, 86 L. ed., 9, 11.

This rule was strengthened by the later cases of Penn. Dairies v. Milk Control Comm., 87 L. ed., 748, and Mayo v. U. S., 87 L. ed., 1504.

From these opinions of the Supreme Court of the United States, we conclude that if Tennessee sought to tax the gasoline which was stored, the tax would be invalid. Such would be the effect of our approval of the tax under section 6821 of the Code. In like manner, if the United States was storing its gasoline *in its own tanks*, the tax would be invalid, but in this case we have approved only the tax on Esso for exercising the privilege of doing business in Tennessee by storing and distributing gasoline which was the property of the United States. The validity of that tax follows from the decisions in State of Alabama v. King & Boozer, supra, and Curry v. U. S., supra,

All assignments of error are overruled and the decree of the Chancellor is affirmed. The parties will divide the costs of the appeal.

(Signed) GAILOR, J.

APPENDIX B

Filed June 11, 1952

DAVIDSON EQUITY

ESSO STANDARD OIL COMPANY

vs.

JAMES CLARENCE EVANS, Comm., etc.

On Petition to Rehear

Petition to rehear has been filed seeking a reconsideration of our former opinion. The petition is divided into three parts.

By the first part, it is insisted that Esso did not "import" the gasoline upon which the tax was laid. In our former opinion, we held that it was unnecessary to a decision, to decide whether or not Esso had imported the gasoline, and expressly so stated.

> "Esso contends that it is a condition precedent to liability for this tax, that the taxpayer shall have imported the gasoline. While we find no support for this argument in the cases cited above, in the present case, it is unnecessary to decide that question since technically Esso did import the gasoline into Tennessee by removing it from the channels of interstate commerce on the barges on the river into its trucks and tanks on the bank."

We re-affirm that holding.

By the second part of the petition to rehear, it is re-argued that we should apply the rule made in Tennessee Oil Co. vs. McCanless, 178 Tenn., 483. We fully considered that case in our former opinion (pp. 7 and 8) and found and held that it was clearly distinguishable from the case at bar. We find nothing in the re-argument to change our former opinion, and the re-argument itself, clearly does not justify a rehearing under Rule 32 of this Court, 185 Tenn., 879.

By the third and final part of the petition to rehear, Esso claims that we should modify our former opinion, and make allowance to it on account of that part of the gasoline handled and taxed which was "export gasoline." Under the law, the tax is assessed on the returns of the taxpayer. It is not insisted that the Commissioner did not make the assessment in the present case, in accord with the return made by Esso. The Petitioner is, therefore, in the position of seeking to falsify its own return. This Court could only decide between conflicting returns and assessments, that is to say, if the Commissioner proposed one return and assessment, and the taxpayer proposed another, doubtless, this Court could decide between them, but the present record presents no such conflict.

We find nothing in the petition to rehear to escape the application of Rule 32, 185 Tenn., 879, and the petition to rehear is denied.

(Signed) GAILOR, *J.*

APPENDIX C

IN THE CHANCERY COURT, PART ONE, AT NASHVILLE

No. 68050

ESSO STANDARD OIL COMPANY

vs.

JAMES CLARENCE EVANS, Commissioner, etc.

CHANCELLOR'S OPINION

I

1. This suit was brought to recover $295,810.10 which said amount the defendant collected from the complainant as gasoline tax under Code Section 1126, et seq., and as inspection fees provided by Code Sections 6809, et seq., stored and handled by the complainant in this State for the

United States Government for the month of January 1944, together with penalties and interest thereon.

Said amount was paid under protest by the complainant on November 30, 1949, after a distress warrant had been prepared and signed by the defendant with a threat of its issuance and service.

The bill prays for a recovery of the aforesaid amount, together with interest from and after November 30, 1949, and further prays for a declaratory judgment as to the rights and liabilities of the parties with respect to taxes, inspection fees, penalties and interest for the remainder of the year 1944 and for the years 1945 and 1946.

It is said by counsel for the parties that if the complainant is liable for the taxes, inspection fees, penalties and interest as insisted upon by the State that the total amount involved will be well over Six Million Dollars.

2. During the time in question the complainant was engaged in the performance of contracts with the United States Government. Under the provisions of these contracts it received considerations ranging from eighteen one-hundredths of a cent to six and three-tenths cents per gallon for receiving and storing in its own facilities, and facilities leased by it for that purpose, gasoline belonging to the United States. It was to, and did, deliver for the United States at points within the State of Tennessee or delivered it to common carriers or contract carriers employed by the United States for transportation to points without the State of Tennessee, such transportation being in accordance with directions given to complainant by the United States as provided in the contracts.

The record shows that, at no time during any of the years in question, nor at any other time until August 10, 1949, did the defendant, Commissioner of Finance and Taxation, or his predecessors in office, make any demand upon the complainant for the payment of any tax, or inspection fee, on account of this government owned gasoline received by the complainant as above set out.

The gasoline in question was received at Memphis in barges and was there inspected by the State Coal Oil or Gasoline Inspectors as provided under Sections 6809, et

seq., of the Code, and reports of such inspections and reports from the complainant as to the said government owned gasoline were filed with the Department of Finance and Taxation in regular course.

The complainant insists that it relied on the contemporaneous and continued administrative construction placed on the Tennessee gasoline tax and oil inspection laws by the State of Tennessee and its officers charged with the administration and enforcement thereof, to the effect that the government owned gasoline received, stored and delivered by it in Tennessee was not subject to the Tennessee gasoline tax and the inspection fees later demanded by the State and paid under protest.

It is insisted by defendants that complainant was never told by any responsible authority of the State that it was free from liability for these taxes.

The fact remains, however, as hereinabove stated, that no demand was made for payment until some years after the accrual of the taxes while complainant always insisted that it was not liable.

3. Therefore, the question involved herein is the liability of the complainant, Esso Standard Oil Company, or its predecessor Standard Oil Company, for the gasoline tax and inspection fees on gasoline stored by the said Company and handled by it for the United States Government, which gasoline was the property of the United States.

II

1. The record shows that such inspections as were made by the agents of the State of Tennessee of the gasoline in question were made while the gasoline rested in barges on the Mississippi River prior to its being pumped from said barges into the storage tanks belonging to complainant.

Fees provided for in the State statutes (Section 5821) as amended, are based on the number of barrels, or fractions thereof, inspected.

The nature of this exaction has been considered by our Courts in a number of cases, and it is seen that the amount

of exaction largely exceeds the cost of inspection, and to that extent is an excise tax.

In State vs. N. C. & St. L. Ry., 176 Tenn. 24, the Court said:

> "This Court has long since recognized that the exaction here in question is in chief an excise tax and to a limited extent only an inspection charge. State of Tennessee v. Reed Oil Co., 176 Tenn., 10, 137 S. W. (2d), 292; State ex rel. v. Jackson, 172 Tenn., 119, 110 S. W. (2d), 323. This is to say the statute assesses an excise tax on the sale, use or storage of these products measured by the number of barrels sold, used or stored. This as well as some charge for inspection."

2. It is seen by this record that the customary procedure with respect to the inspection of gasoline was for the State inspector to obtain samples from the barges anchored in the Mississippi River and then seal said containers until the samples were tested, after which the complainant, Standard Oil Company, was given permission to pump the gasoline out of the barges and into its storage tanks.

The Court is, therefore, of opinion that the incidence of this inspection fee, or tax, arose before the Standard Oil Company became a storee of the government gasoline in question, and, since the complainant up to that time had not exercised the privilege of "sale, use or storage," the Court is of opinion the exaction under Code Sections 6809-6817, et seq., is not properly chargeable to the Standard Oil Company.

The Inspection Act (Code Section 6821) directs each inspector to charge the consignor, or consignee, the sum of twenty cents for testing a barrel or less quantity and twenty cents for each additional barrel.

It is insisted by the defendants that the Standard Oil Company was the consignee of the gasoline in question. The record shows that in some instances the gasoline was consigned to an officer of the United States Government, in care of Standard Oil Company at Memphis, while in other instances the consignment was filled out so as to name the Standard Oil Company, as consignee in the instrument;

however, the Court is of opinion that in the true sense, Standard Oil Company was neither consignee nor consignor, but that the substance of the transaction was that the government itself was the consignee of each of these shipments, and that the Standard Oil Company was simply the contractor employed to store and handle same for the government.

3. A State excise tax could not be a valid levy against the United States Government, the owner of said gasoline, therefore the complainant is entitled to a recovery of such amounts as were paid by it for so called inspection fees.

III

1. In considering the question of liability for the gasoline tax levied by Code Sections 1126, et seq., under the numerous decisions dealing with same, this tax must be regarded as an excise or privilege tax exacted by the State for the privilege of "transporting . . . distributing, storing, etc . . . for any purpose whatever."

2. There was no Act of Congress granting immunity from State and local taxes which applied in this case as was true under the majority opinion of our Supreme Court in Carbide and Carbon Chem. Corp. v. Carson, 239 S. W. (2d) 27.

In that case the Court recognized that liability for State excise, or privilege taxes, exacted against a contractor with the United States Government, was valid except for immunity granted by Congressional Act.

Under the facts shown by this record, the Court is of opinion that the Standard Oil Company did exercise the privilege of storing and handling the gasoline in question belonging to the United States Government under its contracts exhibited in the record, and that, as such storer and handler of gasoline for the fees provided in the contracts, it became liable for the tax levied under the aforesaid Sections of the Code (1126, et seq.).

IV

1. On the other hand, following the course of reasoning employed by the Supreme Court, speaking through Mr.

Justice Chambliss, in the case of *State of Tennessee, ex rel. v. The Texas Company* in an unpublished opinion (pronounced at the December Term 1937), but more particularly on the authority of *Memphis Natural Gas Company v. McCanless*, 180 Tenn., 695, this Court is of opinion that the complainant should not be held liable for penalties and interest in view of the facts and circumstances shown by this record and referred to hereinabove.

In Memphis Natural Gas Company v. McCanless, supra, the Supreme Court, speaking through Mr. Chief Justice Green, said:

> "This controversy is being waged in a court of equity and this Court, since East Tennessee Brewing Co. v. Currier, 126 Tenn., 535, 150 S. W. 541, has exercised the power of remitting penalties imposed upon taxpayers when the equities of the case seem to demand. See also Shipp v. Cummings, 158 Tenn. 526, 14 S. W. (2d) 747, and State et al v. Rowan et al., 171 Tenn. 612, 106 S. W. (2d) 861."

2. In connection with the question of the payment of penalties and interest it is to be observed that no levy was made by the then Commissioner of Finance and Taxation and, although the complainant, through its agents and attorneys, sought to determine whether or not the State proposed to exact gasoline taxes and inspection fees, it was never advised that such exactions would be made by the State, but, on the contrary, had reason to believe that the tax authorities of the State considered that it was not liable for such taxes and inspection fees.

While it is recognized that the failure of the taxing authorities to insist upon payment of a tax does not operate as an estoppel against the State acting through subsequent officials, yet it is felt by the Court that the course of conduct pursued by the State in this instance is such that penalties and interest should not be imposed or permitted to stand in a Court of Equity.

A decree in accordance with the above will be entered.

(Signed) Thos. A. Shriver,
Chancellor.

November 8th, 1951.

APPENDIX D

STATUTES INVOLVED

1126. *Definitions.*—

As used in this statute the term "person" means and includes every individual, firm, association, joint-stock company, syndicate, and corporation.

The term "distributor" means and includes every person who engages in the business in the state of refining, manufacturing, producing, or compounding gasoline or distillate, and selling or storing the same in this state; and also every person who engages in the business in this state of transporting, importing, or causing to be imported, gasoline or distillate into this State, and distributing, storing, or making original sales of the same in this State, for any purpose whatsoever.

The term "original sales" as used in the definition of "distributor" shall mean the first sale made in this state after gasoline shall have been produced, refined and/or shipped or imported into this state, whether such sale shall be wholesale or retail, and/or to one for resale or use.

The term "dealer" means and includes every person other than a distributor, who engages in the business in this State, of distributing or selling gasoline or distillate within this State, and also every person who uses or consumes gasoline (except use or consumption in interstate commerce) when such gasoline has not previously been the measure of a privilege tax under this statute.

The term "gasoline" means and includes (a) the volatile substance produced from petroleum, natural gas, oil shales, or coal heretofore sold under the name of gasoline, (b) any volatile substance or product less than 112 Fahrenheit flash test when tested in a manner approved by U. S. bureau of mines derived wholly or in part from petroleum, natural gas, oil shales, or coal, and (c) benzol and or any other volatile substance used wholly or in combination with gasoline as a liquid fuel.

The term "gallon" shall mean the amount of gasoline, at a temperature of sixty degrees (60) Fahrenheit, necessary to completely fill a standard U. S. gallon liquid measure. (1933, ch. 130; 1937, ch. 202.)

1127. *Privilege tax on gasoline and distillate; original packages excepted; distribution to service stations as sales.*—

Every distributor when engaged in such business in this state, shall pay to the state comptroller through Commissioner of Finance and Taxation, for exclusive use of the state, a special privilege tax, in addition to all other taxes, for engaging in and carrying on such business in this state, in an amount equal to six cents for each gallon of gasoline, and six cents for each gallon of distillate refined, manufactured, produced, or compounded by such distributor and sold, stored or distributed by him in this state, or shipped, transported or imported by such distributor into, and distributed, stored or sold by him within this state, during such year; provided, that no gasoline or distillate shall be included in the measure of the tax liability of a distributor unless said gasoline or distillate shall have previously come to rest within the meaning of the Inter-state Commerce clause of the Federal Constitution; provided, further, that all gasoline and distillate distributed by any distributor to any of its service stations in this state shall be deemed to have been sold, and shall be treated in the same manner as though the same had been sold to dealers or other persons. (1931, ch. 40; 1933, ch. 130.) (Note: An additional tax of one (1c) cent per gallon of gasoline is provided for by the Acts of 1931, Second Extra Session, Chapter 11, and the Acts of 1933, Chapters 103, 117, and 118.)

1128. *Special privilege on gasoline and distillate; original packages excepted.*—

Every dealer each year, when engaged in such business in this state, shall pay to the state comptroller, through the Commissioner of Finance and Taxation, for the exclusive use of the state, a special privilege tax, in addition to all other taxes, for engaging in such business in this state, equal to six cents for each gallon of gasoline and six cents

for each gallon of distillate sold or distributed or stored or used or consumed by such dealer in this state during such year; provided, that gasoline or distillate previously identified as a measure of tax liability of a registered distributor shall not be included in the measure of said dealer's tax liability; provided, further, that no gasoline or distillate shall be included in the measure of any dealer's tax liability unless said gasoline or distillate shall have previously come to rest within the meaning of the Interstate Commerce clause of the Federal Constitution; provided, further, that no gasoline or distillate shall be included in the measure of any dealer's tax liability when such gasoline or distillate was delivered within another state into the tank of the motor vehicle using it. (1931, ch. 40; 1933, ch. 130; 1937, ch. 202.)

(NOTE: An additional tax of one cent (1c) per gallon of gasoline is provided for by the Acts of 1931, Second Extra Session, Chapter 11, and the Acts of 1933, Chapters 103, 117, and 118.)

1129. *Monthly payments.*—

Such tax shall be paid in monthly installments. If the tax shall not be paid on or before the 20th of said succeeding month, it shall become delinquent, and subject to a penalty of one per cent. per day for not exceeding ten days, and it shall be the duty of the comptroller to proceed to collect same, with the penalty and interest by a distress warrant against the delinquent and his surety, and/or suit.

1130. *Loss of gallonage, allowance for, reports, proof.*—

(Omitted as not pertinent.)

1131. *Records kept by dealers and distributors, invoices of carriers, penalty.*—

Each person refining, storing, selling, distributing, or handling gasoline or distillate in this State, shall keep a record showing from whom the same was received, the date of its receipt, and the number of gallons received, together with such other further and different information as the Commissioner may require.

Persons transporting gasoline or distillate not previously identified as a measure of the tax liability of a registered distributor shall have at all times with them subject to scrutiny of representatives of the Department of Finance and Taxation and all peace officers a true record showing where and from whom the gasoline or distillate was received, day and time of receipt, number of gallons, destination, and such other, further, and different information as the Commissioner may require.

Persons transporting gasoline and distillate previously identified as a measure of the tax liability of a registered distributor, shall, if the quantity transported exceeds forty gallons, be subject to the provisions of the foregoing paragraph.

Violation of any of the provisions of this Section is hereby declared to be a misdemeanor and shall be punishable by a fine of not less than Twenty-five ($25.00) Dollars nor more than Fifty ($50.00) Dollars for each offense. (1933, ch. 130.)

1132. *Distributors must report monthly.*—

Each distributor must, within twenty days after the end of each month, make out in duplicate, on forms prescribed by the Commissioner of Finance and Taxation, and deliver to the said Commissioner, a true statement showing the total number of gallons of gasoline or distillate compounded, refined, manufactured, or produced by him in this State, and/or the number of gallons of gasoline or distillate transported, imported, or caused by him to be imported into this State; also a true statement showing the number of gallons stored, sold, or distributed by such distributor during the month; the total amount due the State as privilege taxes for such month, together with such other further and different information as the Commissioner shall require. (1933, ch. 130.)

1133. *Those not distributors, statement required.*—

Each person other than a distributor who may be required under the foregoing Sections to pay the privilege tax on gasoline or distillate, shall file a statement with the Com-

missioner of Finance and Taxation as required by Section 1132 and shall conform in all other respects to the provisions of said Section. (1933, ch. 130.)

1134. *Commissioner's Action on Reports.*—

The Commissioner shall file one of such statements in his office and shall deliver the duplicate copy thereof to the Comptroller. (1933, ch. 130.)

1135. *Distributors and dealers to pay when reports filed.*—

Each distributor and each dealer must, within twenty days after the end of each month, and at the same time the statement required by sections 1132-1134, is delivered to the Commissioner of Finance and Taxation, pay the Comptroller through the Commissioner of Finance and Taxation, the amount of privilege tax shown by such statement to be due for the month for which the statement is made and filed. (1933, ch. 130.)

1136. *Unlawful to fail to report or to make a false report.*—

It shall be unlawful for any distributor or dealer to fail, neglect, or refuse to make and file any statement required by the provisions of said sections, in the manner, or within the time therein provided, or to make any such statement false in any particular.

Any person violating the provisions of this Section shall be deemed guilty of a misdemeanor and shall be fined not less than twenty-five dollars nor more than fifty dollars for each offense. (1933, ch. 130.)

1137. *Penalties.*—

Upon the failure of any person engaged as distributor or dealer to make and deliver to the commissioner of finance and taxation the statement above provided for, or to pay the taxes due, it shall be the duty of the commissioner to revoke his permit, and immediately to proceed to inform himself as best he may regarding the matters and things to be set forth in such statement, and, from such information as he may be able to obtain, to make a statement, showing such matters and things, and determine and

fix the amount of the privilege tax due the state from such delinquent person, and proceed to collect said amount, including a penalty of one per cent per day, for not exceeding ten days, and interest, by the issuance of a distress warrant against the delinquent and the surety on his bond, and, if necessary, by suit on the bond. Upon the request of the Commissioner of Finance and Taxation, it shall be the duty of the attorney-general to institute and prosecute to conclusion all proper and necessary suits for the collection of the taxes. (1933, ch. 130.)

1138. *Statement prepared by commissioner presumed correct.*—

Said statement, as prepared by the Commissioner, shall be deemed prima facie correct, and the burden of proof shall be upon the distributor or dealer to prove its incorrectness in any action growing out of matters and things contained therein. (1933, ch. 130.)

1139. *Distributor to make invoices to purchasers of original packages.*—

Every distributor selling any gasoline or distillate in this state, in the original packages in which shipped, transported or imported into this state by such distributor, shall at the time of making such sale, make out and deliver to the purchaser thereof, an invoice, in which invoice shall be stated the number of gallons of gasoline or distillate covered by such invoice, and that the same has been sold in the original packages in which the same was shipped, transported or imported into this state.

1140. *Not apply to sales for and exported out of the state.*—

Gasoline or distillate not previously the subject of an original sale in this State, stored in this State for export to points outside the State, shall not be included in the measure of the tax liability of any distributor or dealer; provided that such gasoline or distillate is stored in a separate tank marked "export tank";

Provided that a bond is executed by the distributor or dealer that in the opinion of the Commissioner of Finance

and Taxation adequately protects the State against loss of tax in case said gasoline or distillate is not subsequently exported outside the State;

Provided that gasoline or distillate stored for export longer than a period of sixty days must be included in the measure of tax liability of the distributor or dealer so storing such gasoline or distillate. (1933, ch. 130.)

(NOTE: See Acts of 1943, ch. 50.)

1141. *Commissioner of finance and taxation to collect the taxes and pay to state treasurer; expenses limited.*—

It shall be the duty of the Commissioner of Finance and Taxation to collect all taxes accruing under this law, and to issue proper receipts therefor, and to pay all taxes so collected to the State Treasurer, who shall place them to the credit of a fund to be used solely in the construction and maintenance of the highway system of this State, and not exceeding two per centum (2%) of said fund shall be used for expenses of administration, provided, however, that as to the portion of said fund going to the counties, only one per centum (1%) shall be charged and deducted therefrom for the cost of collection and administration. (1933, ch. 130; 1939, ch. 207.)

1142. *Commissioner of finance and taxation may issue distress warrant for past-due taxes; penalty; fee.*—

The Commissioner of Finance and Taxation, in the name of the state, may issue a distress warrant for the collection of such tax when past-due, and for the penalties and costs; and a penalty of one per centum per day is imposed for the failure to pay such tax, and a fee of two dollars for the issuance of a distress warrant, and the usual commissions allowed officers collecting money by virtue of an execution issuing from a court of record; provided, however, when the penalty reaches ten per cent. no further penalty shall be collected. (1933, ch. 130.)

1143. *Dealers Required to Obtain Permit.* —

It shall be unlawful for any distributor or other person to engage in the business of selling, storing or distributing,

in intrastate commerce, gasoline or distillate without first having obtained a permit to carry on such business from the Commissioner of Finance and Taxation. (1933, ch. 130; 1937, ch. 202.)

1144. *Application.*—

Every person desiring a permit to engage in said business of distributor, dealer, or distributing and storing gasoline, shall make application in writing therefor to the commissioner, on forms to be by him provided, which application shall show:

(a) The name and address of applicant;

(b) Whether individual, partnership, association or corporation, and, if partnership or association, the names and addresses of each member;

(c) Whether it is the purpose of applicant to engage as distributor, dealer, or storer, and

(d) Whether wholesale, retail, or both.

1145. *Bond required.*

(Omitted as not pertinent.)

1146. *Revocation of permit.*—

The permit of every distributor, dealer or storer who fails to keep the records, or fails to make and deliver the statements and reports required, or who fails to pay the taxes accrued before they become delinquent, or fails to make and maintain bond as required by law, shall be revoked, and the carrying on of such business thereafter shall be unlawful.

If any distributor or other person operates without a permit a business for which a permit is required under the provisions of the preceding Sections he shall be guilty of a misdemeanor and shall be fined for each separate exercise of the functions of such business the sum of twenty-five to fifty dollars.

Provided, further, that the Commissioner may in his discretion and in the alternative, proceed under the provisions of Sections 9316 and 9317 of the Code of Tennessee, 1932, to

abate and enjoin the further carrying on of said business as a public nuisance. (1933, ch. 130.)

1147. *Forms.*—

It shall be the duty of the commissioner of finance and taxation to provide all necessary and appropriate blank forms and stationery for carrying the provisions of this law into effect, the same to be provided and paid for as other supplies for his department are provided; to cancel permits of delinquents and promptly report them to the comptroller for such proceedings as by law and this statute authorized. (1933, ch. 130.)

CHAPTER No. 50

Public Acts of 1943

Senate Bill No. 315

(By Ballew)

AN ACT to regulate the storage and inspection of gasoline and other volatile substances where the same is manufactured in Tennessee or has come to rest in Tennessee after shipment in interstate commerce and stored in this State pending the export of such gasoline or other volatile substances to points outside the State; to fix inspection fees and provide penalties for violation of the Act.

Section 1. Be It Enacted by the General Assembly of the State of Tennessee, That whenever any gasoline, benzol, burning oil, distillate, fuel oil, gas oil, kerosene, naphtha, or other volatile substances reflecting a gravity of [illegible]6 degrees or above on the Baume scale, produced from petroleum, natural gas or coal, by whatever the name known, and the substitutes therefor, are stored in this State, or whenever such products have come to rest after shipment in interstate commerce and are stored in this State, except when stored at or shipped to or from a petroleum refinery located in this State, and such products are subsequently exported to points outside the State, and same shall be inspected under the provisions of the Code of Tennessee, Sections 6809-6850.6 inclusive, and an inspection fee of one-

twentieth of one per cent per gallon is hereby levied upon such petroleum products temporarily stored in Tennessee and subsequently exported to points outside the State. Distributors or dealers of said exported petroleum products as enumerated in this Act shall make reports to the Commissioner of Finance and Taxation and pay all inspection fees herein levied in like manner as other oil inspection fees levied by the Code of Tennessee, Sections 6809-6850.6 inclusive.

Sec. 2. Be It Further Enacted, That any distributor, dealer or other person storing gasoline or other volatile substances enumerated in this Act for export, shall execute a bond which in the opinion of the Commissioner of Finance and Taxation adequately protects the State against loss of tax in case such gasoline or other volatile substance is not actually exported outside the State.

Sec. 3. Be It Further Enacted, That it shall no longer be necessary for distributors or dealers to maintain separate export tanks and to export gasoline or other volatile substances within sixty days as is provided by the Code of Tennessee, Section 1140.

Sec. 4. Be It Further Enacted, That all gasoline or other volatile substances as described in this Act which are exported to points outside the State, shall only be liable for the inspection fee of one-twentieth of one cent per gallon as levied in Section 1 of this Act, and there shall be no liability for gasoline taxes levied under the Code of Tennessee, Sections 1126--1148.3 inclusive, nor shall there be any liability for the inspection fees levied under the Code of Tennessee, Sections 6809-6850.6 inclusive—it being the legislative intent to make a separate classification for the gasoline and other volatile substances described herein which are exported to points outside the State.

Sec. 5. Be It Further Enacted, That the provisions of this Act shall not apply in any case except where such gasoline or other volatile substance is exported from the State of Tennessee by common carrier or contract carrier who are duly licensed and hold certificates from either the Interstate Commerce Commission or the Railroad and Public Utilities Commission of Tennessee, or both. Provided, however, that

the Commissioner of Finance and Taxation is authorized to promulgate rules and regulations permitting the export or movement to other states of the products enumerated in this Act by other modes of transportation; and the provisions of this Act shall apply where the export or movement beyond the State is made in compliance with such rules and regulations.

Sec. 6. Be It Further Enacted, That the provisions of this Act are hereby declared to be severable. If any of its sections, provisions, exceptions, sentences, clauses, phrases or parts be held unconstitutional or void, the remainder of this Act shall continue in full force and effect, it being the legislative intent now hereby declared that this Act would have been adopted even if such unconstitutional or void matter had not been included therein; that this Act take effect from and after its passage, the public welfare requiring it.

Passed: February 4, 1943.

BLAN R. MAXWELL,
Speaker of the Senate.
JAS. J. BROOME,
Speaker of the House of Representatives.

Approved: February 9, 1943.

PRENTICE COOPER,
Governor.

APPENDIX E

ASSIGNMENTS OF ERROR

1. The Chancellor erred in finding and holding that, under a proper construction of Code Sections 1126 et seq., Esso became liable for the seven cents per gallon gasoline tax by merely storing and handling aviation gasoline belonging to the United States Government aggregating $196,848.68 for the month of January, 1944 (Opinion, R. 365; Decree, R. 368-370).

2. The Chancellor erred in failing to find and hold that the course of conduct pursued by the State (leading Esso to believe that no tax would be imposed and thereby lulling it into security so that it did not take measures which

might have been taken to avoid the tax) was sufficient not only to require the remission of penalties and interest but also to require the remission of the tax itself (Opinion, R. 361-367; Decree, R. 368-370).

3. The Chancellor erred in failing to eliminate, in any event, from the measure of tax liability such gasoline aggregating in January, 1944, 1,005,832 gallons (R. 159, 174), as was shipped by common carriers to air fields in states other than Tennessee and there used (Opinion, R. 361-367; Decree, R. 368-370).

4. The Chancellor erred in construing the Tennessee gasoline tax laws as requiring the inclusion in the measure of Esso's gasoline tax of gasoline belonging to the United States exclusively, and merely in the possession of Esso as agent or bailee, because the Tennessee gasoline tax laws so construed are repugnant to the Constitution of the United States and void under the principle of implied governmental immunity (Opinion, R. 365; Decree, R. 368-370).

5. Having construed the Tennessee gasoline tax laws as requiring the inclusion in the measure of Esso's gasoline tax of gasoline belonging exclusively to the United States, the Chancellor erred in not holding that, as so construed, the Tennessee gasoline tax laws are repugnant to the Constitution of the United States, and void under the principle of implied governmental immunity (Opinion, R. 365; Decree, R. 368-370).

6. The Chancellor erred in failing to hold that the assessment to Esso, for the purposes of the Tennessee gasoline tax laws, of gasoline belonging exclusively to the United States, by including the quantity of such gasoline in the measure of the tax assessed, is illegal and void, for the reason that such assessment is upon or measured by the exclusive property of the United States which is immune from taxation by the State of Tennessee under the Constitution of the United States (Opinion, R. 365; Decree, R. 368-370).

(The United States, Intervenor, in its separate brief filed herein, has adopted the foregoing assignments of error.)

APPENDIX F

Filed June 16, 1952

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

Davidson Equity

ESSO STANDARD OIL COMPANY

v.

JAMES CLARENCE EVANS, COMMISSIONER, ETC.

Petition for Rehearing on Behalf of Appellant, Esso Standard Oil Company

WALLER, DAVIS & LANSDEN,
Solicitors for Petitioner,
Esso Standard Oil Company.

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

Davidson Equity

ESSO STANDARD OIL COMPANY

v.

JAMES CLARENCE EVANS, COMMISSIONER, ETC.

Petition for Rehearing on Behalf of Appellant, Esso Standard Oil Company

MAY IT PLEASE THE COURT:

Your petitioner, Esso Standard Oil Company, one of the appellants herein, referred to as "Esso", respectfully states that it is much aggrieved by the opinion and decision of this Court rendered in this case on June 7, 1952, in that Your Honors affirmed the decree of the

Chancellor, denying to the petitioner refund of gasoline privilege taxes assessed against it under Sections 1126 et seq. of the Tennessee Code.

Your Honors held in the opinion of the Court written by Mr. Justice Gailor that Esso was properly assessed the seven cents per gallon tax for exercising the privilege of storing aviation gasoline belonging to the United States Government, including gasoline exported by common carrier to other states, but that penalties and interest and the inspection fee should be remitted to Esso.

1. *Esso did not import the gasoline into Tennessee.*

In holding that Esso was properly assessed with privilege taxes under Code Section 1126 et seq., it was stated in said opinion of this Court:

> "Esso contends that it is a condition precedent to liability for this tax, that the taxpayer shall have imported the gasoline. While we find no support for this argument in *the cases cited above*, in the present case, it is unnecessary to decide that question since technically *Esso did import the gasoline into Tennessee by removing it from the channels of interstate commerce* on the barges on the river into its trucks and tanks on the bank." (Unless otherwise noted, all emphasis in quotations has been added.)

Esso contended that the condition precedent to its tax liability, that the gasoline shall have been imported or transported by it "*into*" Tennessee, is expressly provided in Code Section 1127 imposing the tax and in the definition of the term "distributor" in Code Section 1126. Esso did not contend that this statutory condition was also to be found in the cases cited by the Court. In all the cases cited, the condition precedent was in fact satisfied because the owner of the gasoline had not only stored the gasoline but had previously imported the gasoline *into* Tennessee from outside the State.

The primary meaning of the word "import" is "to bring from a foreign country into one's own country; as, we import

wines from France." Twentieth Century Dictionary. The word was recently defined by the Supreme Court of the United States in Canton R. Co. v. Rogan, 340 U. S. 511; 95 L. Ed. 488, as follows (340 U. S. at p. 515):

> "To export means to carry or send abroad; to import means to bring into the country. *Those acts begin and end at water's edge.* * * *"

Importation from one state into another is analogous to importation from one country into another. When the barges tied up at the docks on the Mississippi River the gasoline in them was already inside the State of Tennessee. Arkansas v. Tennessee, 246 U. S. 158. In fact, as found by the Chancellor, the gasoline had been inspected by the State (R. 363) and had, therefore, become subject to the jurisdiction of the State of Tennessee before Esso took possession of the gasoline.

A case closely in point is State v. Fidelity & Deposit Co. of Maryland et al., 78 P. 2d 1090, decided by the Supreme Court of Washington in 1938. In that case the State of Washington attempted to collect the "fuel oil tax" from a railway company for the privilege of distributing oil. The court analyzed the statute in question as follows (78 P. 2d at p. 1092):

> "It appears, upon analysis of section 79 of the act, that three classes of distributors are taxed, namely: (a) Persons who refine, manufacture, produce, or compound fuel oil and sell, distribute it, or in any manner use the same within the State; (b) persons who import any fuel oil into the State, and store, sell, withdraw, distribute, or in any manner use the same within the State; (c) persons who, having acquired fuel oil in original packages or containers, distribute or sell the same, whether in the original package or container or otherwise, or in any manner use the same."

It then held that the railway company was not liable for the tax because, although it had received and stored the oil

in question, the oil had been imported into the state by another party. The Court said:

> "The word 'import' when used as a verb, means, by derivation, 'to bear or carry into,' and by common usage, 'to bring in.' In its technical meaning, it is usually employed to designate the bringing in of articles from a foreign country. In this statute, it evidently means the bringing into the state of fuel oil from any place without the state. A person who 'imports' fuel oil into the State is one who brings fuel oil into the State."
>
> * * * * * * *
>
> "* * * it is admitted that the oil in question was brought into the State by the oil company and was there sold to the railway company just as the contract contemplated. We therefore hold that the oil company, and not the railway company, imported the oil. Accordingly, the railway company does not fall within any of the classes of persons which the statute makes subject to the tax, for, although it stored and used it, it did not import and store, etc. * * *"

2. *The grounds given in the opinion of the Court for distinguishing Tennessee Oil Co. v. McCanless, 178 Tenn. 683, raise new issues of constitutional law.*

The opinion of the Court on this subject was as follows:

> "Further, Esso insists that the decision in Tennessee Oil Co. vs. McCanless, 178 Tenn. 683, relieves it from liability in the present case. We find that case clearly distinguishable on the facts. In that case, the Obion County Board of Education rented a storage tank from the Tennessee Oil Company, with an agreement that it would pay the Tennessee Oil Company a fee of two cents a gallon for distributing the gas on order of the Board. In legal effect, the Board of Education, which was exempt, was storing gasoline in its own tank. Although the rental of the storage tank was a nominal amount, it had the effect of changing the status of the

Tennessee Oil Company from that of an independent contractor to that of an agent or servant of the Board. In the present case, the charge which Esso made the United States for storage alone, was a very substantial and lucrative business and considering the vast amount of gasoline involved, since the contracts show that Esso charged from 18/100 of a cent to 6 3/10 cents per gallon for receiving and storing the gasoline in its tanks. This was particularly true, as the State insists, since at the time of these contracts the United States owned all gasoline of this quality, and without this Government business, Esso would have had no lucrative return on its tanks, and made no money with which to pay its personnel."

In the case at bar the Court holds for the first time, in construing Code Sections 1126 et seq., that the ownership of the gasoline is immaterial. In the Tennessee Oil Company case the Court held that the *determinative* question was "To whom does the gasoline belong when it comes to rest in the State of Tennessee"? (178 Tenn. p. 691)? As now construed, Code Sections 1126 et seq., impose a tax of seven cents per gallon under the facts disclosed by the record in the case at bar, but no tax under the facts of the Tennessee Oil Company case. As so construed, Code Sections 1126 et seq., deny Esso the equal protection of the laws guaranteed by the Fourteenth Amendment and are unconstitutional and void because there is no reasonable basis for the classification made by the Court.

Your Honors did not undertake in the opinion filed to spell out in detail the distinction or distinctions between the two classes of cases,—the one where the tax is not due, and the other where the tax is due. Your Honors did hold, as we read the opinion, that the distinction or distinctions between the two classifications are not such that Esso and the United States could have chosen to come within the exempt class, rather than in the non-exempt class, and have made this choice effective by a formal change in the contracts, such as a provision for the payment of a nominal flat rental for the use of the tanks in addition to the charge per gallon.

We say this because Your Honors held that Esso was not "prejudiced in any way" by the State's failure to collect the tax as and when it became due. Obviously if Esso and the United States could, by some such formal change, have put themselves in the Tennessee Oil Company classification, the State's failure to collect the tax as and when it became due, misled Esso and *did* prejudice it. The collection of the tax for one month would have enabled the parties to avoid the tax for all succeeding months.

Since Your Honors did not spell out the distinction or distinctions between the two classifications, we can do no more in this petition for rehearing than urge, as we do, that whatever the distinction or distinctions are, they are so unreasonable and arbitrary and lacking in substance as to render Code Sections 1126 et seq., unconstitutional and void because they deny Esso equal protection of the laws.

We deem it proper to point out in this connection that the statutory language itself gives no suggestion of a distinction or distinctions now made by the Court and that no prior decision of the Court suggests such distinction or distinctions.

We further deem it proper to point out that the charge of two cents per gallon made in the Tennessee Oil Company case covered both storage and distribution (within Obion County) and the range of fees in the case at bar, 18/100 of a cent per gallon to 6 3/10 cents per gallon, is based mainly upon the mileage involved in distribution, where such distribution was to be made in Esso's own equipment. In the case at bar (involving January 1944) the only distribution from the Memphis Terminal in Esso's own vehicles was of gasoline going to Memphis Airport. All the other gasoline was delivered by Esso to common carriers and the total charge made by Esso was a fraction of a cent per gallon. The facts in this regard are clearly set forth in the briefs heretofore filed, with specific references to the record.

It is well settled that an arbitrary classification for purposes of taxation conflicts with the Fourteenth Amendment. Schlesinger v. Wisconsin, 270 U. S. 230. The Fourteenth Amendment requires that the classification be not arbitrary, but based on a real and substantial difference having a

reasonable relation to the subject of the particular legislation. Quaker City Cab Co. v. Pa., 277 U. S. 389. Phrasing the same principle differently:

> "The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment. * * *" (Hillsborough v. Cromwell, 326 U. S. 620).

It is respectfully submitted that the classification made by Sections 1126 et seq. of the Code of Tennessee, as now construed by the Court, is so arbitrary as to amount to no classification at all, and Esso specifically relies upon the equal protection of the laws clause of the Fourteenth Amendment as a ground for this petition for rehearing.

3. *Export gasoline.*

In the opinion of this Court, it was stated that "Esso kept no figures of the amount of the exported gasoline, and made no return showing those figures to the Department of Finance and Taxation, as the law required. Apparently, it is impossible at this point, to establish with any accuracy, what those figures were."

There has been no dispute as to the amount of export gasoline involved in this case. Esso did keep the figures and the exact amount for the month of January 1944 was 1,005,832 gallons. This was the exact amount alleged in the complaint (R. 7) and proved without contradiction (R. 159, 174), and is the amount specified in Esso's third assignment of error.

It is true that in Esso's monthly report to the Commissioner of Finance and Taxation which included all the government owned gasoline for January 1944, Esso did not give separate figures on the 1,005,832 gallons of export gasoline. The reason for this was obvious. At the time the gasoline in question was inspected, stored for export and exported, the State was not claiming that any of the government owned gasoline was subject to either the gasoline privilege taxes or to the inspection fee. It was useless for

the taxpayer to pay 1/20 cent per gallon inspection fee and claim an exemption as to additional taxes at a time when the State was not claiming any tax liability.

No requirement of law has been pointed out whereby Esso was required to make any return or report on the export gasoline other than it has done. Chapter 50 of the Public Acts of 1943 (Williams Code, Sections 6850.7-6850.11), the statute which provides for the exemption, was attached as an appendix to Esso's Assignments of Error, etc. on this appeal. We find no provision in this statute requiring Esso to make any reports other than the reports it has made. In the letter of December 16, 1943, in which Mr. Weakley requested Esso to make monthly reports of the government owned gasoline, no request was made that the export gasoline be reported separately (Defendant's Exhibit 4). Esso included in its monthly returns all the information the Department of Finance and Taxation called for and no tax was assessed thereon until shortly before this litigation commenced. Beginning promptly after the assessment and collection of this tax on all the government owned gasoline, Esso has consistently claimed that it is entitled at least to exemption from all but the inspection fee of 1/20 of 1 cent per gallon on the 1,005,832 gallons of export gasoline.

In denying the contention of Esso that because of the inequitable course of conduct of the State, the State should be denied recovery of the taxes at this late date, the Court concluded with the statement that "The record does not show that Esso has been prejudiced in any way by a failure to collect the tax."

Even if the State cannot be estopped, still it should not be permitted to profit from its own wrong. The state officials misled Esso into believing that separate reports and payment of 1/20 cent per gallon on the export gasoline were not required. The Court correctly states that "under the frame of the Act, the assessment for the tax is made on the returns of the taxpayer." Here the State did not make such assessments until several years later. Esso has been prejudiced by such action of the State, at least in so far as the export gasoline is concerned.

Your petitioner respectfully requests a rehearing based upon the propositions discussed above.

A copy of this petition has been furnished counsel for the State.

Respectfully submitted,

WALLER, DAVIS & LANSDEN,
By (Signed) WILLIAM WALLER,
Solicitors for Petitioner,
Esso Standard Oil Company.

STATE OF TENNESSEE
County of Davidson

I, William Waller, make oath that I am one of the solicitors for the petitioner in this case and that in my opinion the petitioner is entitled to the relief sought.

(Signed) WILLIAM WALLER.

Sworn to and subscribed before me this 16th day of June, 1952.

(Signed) O. LAWRENCE DORTCH,
[SEAL.] *Notary Public.*

My commission expires: 1/12/55.

Receipt is acknowledged of a copy of the foregoing petition for rehearing. This 16th of June, 1952.

WALKER & HOOKER,
CUMMINGS & CRABTREE,
Solicitors for State of Tennesse,
By (Signed) K. HARLAN DODSON, JR.

APPENDIX G

IN THE SUPREME COURT OF THE STATE OF TENNESSEE

Davidson County

ESSO STANDARD OIL COMPANY, *Complainant-Appellant*,

vs.

JAMES CLARENCE EVANS, COMMISSIONER, ETC., *Defendant-Appellee*

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL

Esso Standard Oil Company, complainant-appellant in the above cause, in connection with its appeal to the Supreme Court of the United States, hereby files the following assignment of errors upon which it will rely in its prosecution of said appeal from the final judgment and decree of the Supreme Court of Tennessee entered June 7, 1952, and order denying petition for rehearing entered July 11, 1952.

The Supreme Court of Tennessee erred as follows:

1. Having construed the Tennessee gasoline tax laws (secs. 1126 et seq. of the Code of Tennessee (1932) as amended) as requiring the inclusion in the measure of Esso Standard Oil Company's gasoline tax of gasoline belonging exclusively to the United States, the Court erred in not holding that, as so construed and applied, said Tennessee gasoline tax laws are repugnant to the Constitution of the United States and void under the principle of implied constitutional immunity.

2. The Court erred in failing to hold that the assessment to Esso Standard Oil Company, for the purposes of said Tennessee gasoline tax laws, of gasoline belonging exclusively to the United States, by including the quantity of such gasoline in the measure of the tax assessed, is illegal and void for the reason that such assessment is upon or measured by the exclusive property of the United States, which is immune from taxation by the State of Tennessee under the Constitution of the United States.

3. Having construed said Tennessee gasoline tax laws as requiring the inclusion in the measure of Esso Standard

Oil Company's gasoline tax of gasoline belonging exclusively to the United States, which was the property of the United States when it came to rest in the State of Tennessee, and having at the same time adhered to its decision in Tennessee Oil Company v. Commissioner, 178 Tenn. 683, 157 S. W. 2d 267, construing said laws as not requiring the inclusion in a gasoline distributor's gasoline tax of gasoline stored and handled by such distributor which did not belong to it when it came to rest in the State of Tennessee, the Court erred in not holding that, as so construed and applied, the Tennessee gasoline tax laws are repugnant to the Fourteenth Amendment to the Constitution of the United States and void as denying to Esso Standard Oil Company the equal protection of the laws for the reason that the classification made by said laws, as so construed and applied, is arbitrary and without reasonable or substantial basis.

4. The Court erred in failing to hold that the assessment to Esso Standard Oil Company, for the purposes of the Tennessee gasoline tax laws, of gasoline belonging exclusively to the United States, which was the property of the United States when it came to rest in the State of Tennessee, by including the quantity of such gasoline in the measure of the tax assessed, is illegal and void, for the reason that such assessment denies to Esso Standard Oil Company the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, in that the Court, in upholding such assessment, adhered to construction placed upon said laws in Tennessee Oil Company v. Commissioner, 178 Tenn. 683, 157 S. W. 2d 267, and the classification made by said laws, as so construed and applied, is arbitrary and without reasonable or substantial basis.

WHEREFORE, complainant-appellant, Esso Standard Oil Company, prays that the judgment of the Supreme Court of Tennessee be reversed, and for such other relief as the Court may deem fit and proper.

(Signed) WILLIAM WALLER,
Counsel for Complainant-Appellant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 330.

ESSO STANDARD OIL COMPANY, *Appellant*,

v.

JAMES CLARENCE EVANS, Commissioner of Finance and Taxation, etc., *Appellee*.

BRIEF ON BEHALF OF APPELLANT, ESSO STANDARD OIL COMPANY.

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WALLER, DAVIS & LANSDEN,
Of Counsel.

February 18, 1953.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REFERENCE TO OPINIONS BELOW

The opinions below (R. 6, 24) have not been officially reported.

GROUNDS OF JURISDICTION

The jurisdiction of this Court to review the decision of the Supreme Court of Tennessee is conferred by Title 28, United States Code, secs. 1257(2) and 2101(c). The judgment of the Supreme Court of Tennessee was entered June 7, 1952. (R. 13). Petition to rehear was seasonably filed June 16, 1952 (R. 14), was entertained and was denied

July 11, 1952. (R. 24). Petition for appeal to this Court was presented on August 8, 1952. (R. 2). Probable jurisdiction was noted November 10, 1952. (R. 327).

STATEMENT OF THE CASE

During 1943-1946, Standard Oil Company of Louisiana, now Esso Standard Oil Company, herein for convenience referred to as "Esso," performed contracts with the United States, pursuant to which Esso received into storage tanks in Tennessee, owned or leased by it, aviation gasoline belonging to the United States and subsequently delivered such gasoline to the United States, or common carriers designated by the United States, as from time to time directed by it. The contracts contained provisions requiring the United States to reimburse Esso for local taxes. (Article 18 of Complainant's Exhibit 1, R. 345-349; Stipulation, R. 326). The State of Tennessee, with full knowledge of these contracts and of the course of dealings between Esso and the United States (R. 283-285, 307-309), made no assertion (until 1949) of tax liability against Esso under secs. 1126-1147 of the Code of Tennessee, 1932, found at pages 278-283 of the Official Code, as amended by Chapter 40, Acts of 1931, Chapter 130, Acts of 1933, Chapter 202, Acts of 1937, and Chapter 50, Acts of 1943, comprising, so far as here pertinent, the gasoline tax laws of said state.

In 1949, a new Commissioner of Finance and Taxation, charged with enforcement of the tax laws, made a retroactive assessment against Esso for the seven cents per gallon tax on all gasoline so handled during the month of January, 1944, and succeeding months throughout World War II, together with interest, penalties, and a 4/10 cent per gallon inspection fee. No assessment was made for 1943 because this year was barred by the statute of limitations. The tax assessed for January, 1944, was $198,837.03 on 2,840,529 gallons. The taxes assessed for the remainder of 1944, 1945 and for the first six months of

1946 aggregated $3,818,212.16, exclusive of interest, penalties and inspection fees (R. 30, 41). Esso paid under protest the tax, interest, penalty and inspection fees for the month of January, 1944, and brought suit to recover in the Chancery Court. (R. 26-38). The court denied recovery for the tax of $198,837.03, but gave judgment in Esso's favor for the interest and penalty, on the ground that it was inequitable for the State to have collected same, and for the inspection fee on the ground that it was illegally assessed against property of the United States. (R. 315-317). Both parties appealed and the Supreme Court of Tennessee affirmed. On the appeal to this Court only the seven cents per gallon tax is involved. A suit by the State against Esso for the period after January, 1944, is pending in the State court and its disposition will depend upon the decision of this case.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the appendix to the brief for the United States in the companion case, *United States of America* v. *James Clarence Evans, Commissioner, etc., et al.*, Docket No. 378. A brief analysis of these statutes will be appropriate as a preliminary to the argument.

1. A gasoline "distributor" as defined in Code sec. 1126, such as Esso in the case at bar, is subject to the seven cents per gallon tax on all gasoline imported by it into the State for sale or storage, subject to a credit under Chapter No. 50, Public Acts of 1943, for gasoline exported by common carrier to points outside the State.

2. Every person other than a distributor who sells, distributes, or uses gasoline in Tennessee, "when such gasoline has not previously been the measure of a privilege tax under this statute," is defined by the same section of the Code to be a "dealer," and all such persons are made liable for the tax on all gasoline stored or used by them

in the State. Since the gasoline here involved was not currently included in the measure of Esso's tax liability as a distributor, the United States came within the definition of "dealer".

In the early days of the Tennessee gasoline tax law, when it was merely a tax on the sale of gasoline, it was discovered that large users might import gasoline in interstate commerce and escape the payment of the tax. This was the reason the law was amended to include "storage" as a taxable incident; and the reason for the broad definition of "dealer". Under the present law, if a consumer imports gasoline into the state in interstate commerce, such consumer or owner becomes liable for the tax by storing it. Thus a contractor which imported gasoline for its own use; a railroad company which imported gasoline for its own use; and an air line which imported gasoline for its own use, have all been held liable for the tax. *Foster & Creighton* v. *Graham*, 154 Tenn. (1 Smith) 412; *N. C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249; *Am. Airways* v. *Wallace*, 57 F. 2d 877.

The so-called inspection fee (Code secs. 6809 et seq.), of 4/10 cent per gallon, was regarded, prior to the decision in the case at bar, as an identical tax with the seven cents per gallon tax, except that so much of said tax as represents the actual cost of inspection was and is regarded as a true inspection fee. In *Texas Company* v. *McCanless*, 177 Tenn. 238, the Tennessee Supreme Court upheld the contention of the distributor that the statute levying the seven cents per gallon tax and the statute levying the 4/10 cent per gallon inspection fee should be considered *in pari materia*, and that a statute amending Code secs. 1126 et seq., so as to give the distributor credit for the tax on gasoline exported to other states, also amended by implication Code secs. 6809 et seq., with the result that the distributor was also entitled to credit for so much of the 4/10 cent per gallon inspection fee on exported gasoline as did not represent the actual cost of inspection.

Both taxes are considered "privilege taxes" under Article II, sec. 28, of the Tennessee Constitution, which authorizes taxes on "privileges" in addition to uniform *ad valorem* taxes on property. The Tennessee Supreme Court has said: "A privilege is whatever the Legislature choose to declare to be a privilege and to tax as such." *Kurth* v. *State*, 86 Tenn. 134. An illustration of a privilege tax is the tax "on automobiles and motorcycles used for pleasure," upheld in *Ogilvie* v. *Hailey*, 121 Tenn. 392, as against the contention that no business or occupation is involved in the use of automobiles and motorcycles for pleasure.

It matters little how we characterize the tax. For the purpose of Article II, sec. 28, of the Tennessee Constitution, the tax is a privilege tax and not a property tax, because property taxes must be assessed according to the value of the property and must be equal and uniform throughout the state. But in determining Federal constitutional questions, the practical operation and effect is to be considered rather than the nomenclature. *New Jersey Realty Title Insurance Co.* v. *Division of Tax Appeals*, 338 U. S. 665, 674; *United States* v. *Allegheny County*, 322 U. S. 174, 184; *Quaker City Cab Co.* v. *Commonwealth of Pennsylvania*, 277 U. S. 389, 401; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 366.

The differences between this tax and a Tennessee property tax are: (1) the property tax is levied once a year on any particular item of property, while the gasoline tax is levied only once during the life of the gasoline; (2) the property tax is levied against the person who owns the property on a specified assessment date, while the gasoline tax is levied against the first owner of the gasoline in Tennessee (unless the owner is exempt or immune); and (3) the property tax is measured by the value of the property, while the gasoline tax is measured by the number of gallons of gasoline.

In the case at bar the Tennessee Supreme Court said that the tax was "for exercising the privilege of doing

business in Tennessee by storing and distributing gasoline which was the property of the United States." (R. 12). In *Foster and Creighton* v. *Graham, supra*, the Court called it an "excise tax,"—the same characterization applied in the case at bar to the inspection fee. (R. 8). In *Texas Company* v. *McCanless, supra*, at page 243, the Court characterized it as a tax "measured with respect to property" and remarked that, in order to have jurisdiction to tax it, "the property must be located within the jurisdiction of the state." In *Tennessee Oil Company* v. *McCanless*, 178 Tenn. 683, at page 692, the Court referred to the tax as a "tax on the gasoline." In so characterizing the tax the Court was not attempting to justify it against attack on Federal constitutional grounds. In any event the tax is measured by the gallonage, and in the language of this Court in *United States* v. *Allegheny County*, 322 U. S. 174, 185, there is "little theoretical difference, and no practical difference at all" between a tax on the gasoline and a tax measured by the number of gallons of gasoline owned by the United States.

SUMMARY OF ARGUMENT

1. It is the appellant's contention that the Tennessee gasoline tax of seven cents per gallon, assessed against and collected from a Government contractor storing gasoline for the United States, is invalid under the federal constitution to the extent that it is assessed with respect to gasoline owned by the United States, under the principle of implied constitutional immunity.

2. It is further the contention of appellant that the Tennessee gasoline tax statute, as construed by the State Supreme Court, unconstitutionally discriminates against gasoline distributors who store and handle gasoline for the owner in the manner in which, and for the compensation for which, Esso stored and handled the gasoline here involved for the United States, in favor of distributors who store and handle gasoline for the owner in the manner and

for the compensation outlined in *Tennessee Oil Company* v. *McCanless*, 178 Tenn. 683, thereby violating the equal protection of the laws clause of the Fourteenth Amendment.

The foregoing contentions are made in the assignment of errors. (R. 4-5).

ARGUMENT

Implied Constitutional Immunity

The question of implied constitutional immunity has been argued in the brief of the United States in its appeal, Docket No. 378, and this appellant refers to and adopts said argument on this point.

We beg to emphasize that this is not a tax on the profits or income derived by Esso from the business of storing the gasoline for the United States. As will be seen, Esso's payments from the United States for the month of January, 1944, exclusive of reimbursement for the rental charge on the Lion Oil Refining Company's tanks of $450.00, amounted to $12,359.55. The tax assessed for this same period was $198,837.03. Considering the tax (as did the State Supreme Court) as an occupation tax levied on Esso "for exercising the privilege of storing and distributing gasoline which was the property of the United States" (R. 12), the disparity between Esso's gross income and the tax is sufficient to distinguish every state tax of this character heretofore upheld by this Court as against a contention that the constitutional immunity of the United States was involved. This tax is not on "the contractor's own property, profits or purchases." *United States* v. *Allegheny County*, 322 U. S. 174, 186.

We are not here concerned with the *theory* that "the power to tax involves the power to destroy," referred to by Mr. Justice Frankfurter in his concurring opinion in *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 489, as a "seductive *cliché*." We have here *in practice* the imposition of a state tax which, had it been levied at the time,

would obviously have interfered with the operations of the Army Air Force. The gasoline in question was stored in Tennessee by Esso, as bailee of the United States, so as to be available for shipment by tank trucks to Army airfields in the vicinity of the storage point—some in Tennessee and others in adjoining states. The Tennessee Supreme Court said (R. 10-11) that the "record does not show that Esso was prejudiced in any way by a failure to collect the tax." Since the undisputed evidence was that if the tax had been demanded in 1943, the contracts for 1944 and later years would not have been approved on behalf of the United States (R. 189-190) the State Court must have meant (unless it meant that it was the United States rather than Esso which was prejudiced) that the tax could not have been avoided by mere formal changes in the contracts or minor changes in the method of operations, but only by a discontinuance of the operations in Tennessee. Such discontinuance would have crippled the operations of the Army Air Force in the middle of the war.

The Fourteenth Amendment

In presenting this point, the appellant assumes, only for the purposes of argument, the validity of the argument made by the appellee on the constitutional immunity question, viz., that in the absence of express congressional legislation, a state tax is invalid under that principle only where the legal incidence of the tax, as a matter of state law and without reference to its practical operation and effect, is on the United States. The Fourteenth Amendment question does not arise unless the Court either pretermits, or decides adversely to the contention of the appellants, the constitutional immunity question. If, however, the appellee's theories on this question be accepted, we submit that the tax would nevertheless be invalid under the Fourteenth Amendment.

The question of the liability of a bailee arose here only because the tax could not be collected from the owner.

This was attempted in only one prior case. By a long line of Tennessee decisions,[1] a political subdivision of the State of Tennessee is exempt from taxation except where the taxing statute expressly provides otherwise. Such political subdivisions have accordingly been able to import gasoline into the State in interstate commerce and store and use it without paying the tax. However, in *Tennessee Oil Company* v. *McCanless, supra,* a political subdivision—in that case the Obion County Board of Education—made an arrangement with a distributor to store and handle its gasoline in the distributor's tank with the distributor's own personnel, and the Commissioner of Finance and Taxation sought to collect the tax from the distributor as bailee. The State Supreme Court upheld a lower court decision that the distributor was not liable, saying: "The determinative question is: To whom does the gasoline belong when it comes to rest in the State of Tennessee?"

In the case at bar, Esso relied upon the Tennessee Oil Company decision in support of its contention that, as a matter of state law, it was not liable for the tax. The Supreme Court of Tennessee held that Esso was liable as bailee, and in so doing, did not overrule the Tennessee Oil Company case, but reaffirmed and approved the decision and distinguished it on its facts.

We have only the two Tennessee cases involving the liability of a bailee for the gasoline tax; (1) the Tennessee Oil Company case; and (2) the case at bar. In each case the bailee was a "distributor." On the face of it, the two distributors, Tennessee Oil Company and Esso, were members "of the same class"; and if it appears from the decisions in these two cases that Esso has been selected "for discriminatory treatment" and has been denied "the right to equal treatment," the statute as so construed and applied is unconstitutional as denying to Esso the equal protection of the laws guaranteed by the Fourteenth Amendment. *Hillsborough* v. *Cromwell*, 326 U. S. 620, at

[1] Cited in *Tennessee Oil Company* v. *McCanless*, 174 Tenn. 683.

p. 623. This is true whether the law itself makes the discrimination, as in *McFarland* v. *American Sugar Company*, 241 U. S. 79, or whether, as in *Yick Wo* v. *Hopkins*, 118 U. S. 356, the law is such that it can be and is unfairly and unequally administered and applied.

If, however, distributor-bailees be said to have been divided into two classes, one of which is subject to the tax and the other not subject to the tax, the statute is valid if the classification is reasonable, but is invalid if the classification is arbitrary, illusory or invidious. *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389; *Royster Guano Co.* v. *Virginia*, 253 U. S. 412. In his dissenting opinion in *Quaker City Cab Co.* v. *Pennsylvania*, *supra*, Mr. Justice Brandeis said (277 U. S. 406):

> ". . . In other words, the equality clause requires merely that the classification shall be reasonable. We call that action reasonable which an informed, intelligent, just-minded, civilized man could rationally favor. In passing upon legislation assailed under the equality clause we have declared that the classification must rest upon a difference which is real as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike; that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the State; and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote or negligible. Subject to this limitation of reasonableness, the equality clause has left unimpaired, both in range and in flexibility, the State's power to classify for purposes of taxation. Can it be said that the classification here in question is unreasonable?"

In *Royster Guano Co.* v. *Virginia*, *supra*, this Court, speaking through Mr. Justice Pitney, declared invalid a Virginia tax law which taxed the income of Virginia corporations derived both from business done inside the state

and outside the state, while exempting entirely the income derived from outside the state by Virginia corporations which did no local business, saying (253 U. S. 415-416):

> ". . . Nevertheless, a discriminatory tax law cannot be sustained against the complaint of a party aggrieved if the classification appear to be altogether illusory. Now both of the taxing provisions herein question relate to corporations organized under the laws of Virginia. It is the object of c. 495 to exempt such corporations from income taxes (as well as taxes upon intangible property) where they do no business within the State except holding their stockholders' meetings therein; . . . But no ground is suggested, nor can be conceived of, any, sustaining this exemption which does not apply with equal or greater force as a ground for exempting from taxation the income of Virginia corporations derived from sources without the State where they also transact income-producing business within the State. Corporations of this class derive no more protection from the State of their origin with respect to their outside business, and are no less subject to taxation by the States in which such business is conducted, than corporations of the other class; and they are required to comply with the same laws as to the payment of organization taxes and annual registration fees and franchise taxes to the State of origin. . . . It is obvious that the ground of difference upon which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation. It follows that it is arbitrary in effect; and none the less because it is probable that the unequal operation of the taxing system was due to inadvertence rather than design."

"The state action, which is reviewable under the Fourteenth Amendment, is the composite result of both legislation and its judicial interpretation." *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562, at page 570. Where the legislature expressly makes the classification on the face of the statute, but fails to indicate the reason for differentiating in respect to taxation between the two classes, the

Court may hold the statute valid if the Court can conceive of a valid reason for the differentiation. Cf. dissenting opinion in *Royster Guano Co.* v. *Virginia, supra.* Where, however, the classification is read into the statute by the State Court and the reason for the differentiation is given by the State Court, the inquiry is presumably limited in this Court to whether the reason given is a valid one.

In discussing this proposition we shall disregard entirely the status (as to tax exemption or immunity) of the owner of the gasoline involved. If the basis on which the Court reaffirmed and approved the Tennessee Oil Company decision was that the bailee of an exempt governmental unit is not liable, but the bailee of any other owner *is* liable for the tax, it would follow that the *legal incidence* of the tax is on the owner rather than the bailee, and the decision in the case at bar would unquestionably run afoul of the principle of implied constitutional immunity. Furthermore, if the basis of the discrimination against Esso was the ownership of the gasoline by the United States, or the fact that the United States had agreed to reimburse Esso for local taxes, such discrimination would also render the tax unquestionably invalid under that principle, without reference to the Fourteenth Amendment. The State Supreme Court, however, disclaimed any such intention. The opinion states (R. 11):

> "We observe that any liability of the United States, under our decision, is the result of private contract with Esso, and not the result of Station action."[1]

The result of the decision in the case at bar is, if we take the above quoted language at face value, that the distributor, Esso, rendered itself liable for the tax because of the activities engaged in by it in the performance of its contracts with the owner of the gasoline, or because of the basis on which its compensation was computed, or because of the amount of such compensation, or a combination of

[1] This was also true in *United States* v. *Allegheny County, supra.*

some of these factors. Conversely, the distributor, Tennessee Oil Company, did not render itself liable for the tax because its activities in the performance of its contract with the owner of the gasoline were *different* from the activities engaged in by Esso in the case at bar, or the basis on which its compensation was computed was *different*, or the amount of such compensation was *different*.

The question thus resolves itself into whether the differences between the two sets of facts were sufficiently substantial to justify a classification for tax purposes, as the appellee insists, or whether they are so illusory, as the appellant insists, as to render the statute, as so construed and applied, unconstitutional as denying to appellant the equal protection of the laws.

What are the differences? On this point our source of information must be the opinion of the State Supreme Court in the Tennessee Oil Company case and its opinion in the case at bar.

The facts in the Tennessee Oil Company case are stated as follows by the Court (178 Tenn. 689-690):

> "Complainant on learning that the Obion County Board of Education was seeking means by which it might purchase tax free gasoline for the use of its school busses and other purposes incident thereto, contacted the Superintendent of Education and an arrangement was made whereby complainant leased to the said Obion County Board of Education a 12,000 gallon storage tank, being one of four located at its bulk plant at Union City, Tennessee, for $1.00 and other considerations. Complainant agreed to procure gasoline for the said Board of Education at cost plus freight, storing same in the leased tank, and to deliver it on the orders of the Superintendent of Education at a charge of two cents per gallon for such delivery. On receipt of an order from said Board of Education complainant would order a car of gasoline from the Shell Petroleum Corporation to be shipped to Obion County Board of Education, and the gasoline would

then be shipped by the Shell Petroleum Corporation from its Wood River Refinery in the State of Illinois, consigned to Obion County Board of Education and invoiced 'sold to' Tennessee Oil Corporation, Dyersburg, Tennessee, and 'shipped to' Obion County Board of Education. Said gasoline when received was stored in the leased tank.

"The complainant insisted on payment for the gasoline so shipped immediately after each car was unloaded and it billed the Obion County Board of Education for the market cost of the gasoline, freight, and delivery charges, and these amounts were paid by the said Board of Education to the complainant. The Shell Petroleum Corporation charged the gasoline to the account of the complainant and complainant paid said corporation as billed.

"It appears that no gasoline was placed in said leased tank except that shipped to the said Board of Education, and that no gasoline was sold therefrom or was delivered therefrom except that delivered as directed by the Superintendent of Education, and duplicate receipts were taken when the gasoline was delivered, one going to the office of the complainant and one to the Superintendent of Education. The proof further shows that none of said gasoline contained in said leased tank was ever inventoried as stock of the complainant company."

The distinguishing facts in the case at bar are stated by the Court as follows (R. 9-10):

"Further, Esso insists that the decision in Tennessee Oil Co. vs. McCanless, 178 Tenn. 683, relieves it from liability in the present case. We find that case clearly distinguishable on the facts. In that case, the Obion County Board of Education rented a storage tank from the Tennessee Oil Company, with an agreement that it would pay the Tennessee Oil Company a fee of two cents a gallon for distributing the gas on order of the Board. In legal effect, the Board of Education, which was exempt, was storing gasoline in its own tank. Although the rental of the storage tank was a nominal amount, it had the effect of changing the

status of the Tennessee Oil Company from that of an independent contractor to that of an agent or servant of the Board. In the present case, the charge which Esso made the United States for storage alone, was a very substantial and lucrative business and considering the vast amount of gasoline involved, since the contracts show Esso charged from 18/100 of a cent to 6 3/10 cents per gallon for receiving and storing the gasoline in its tanks. This was particularly true, as the State insists, since at the time of these contracts the United States owned all gasoline of this quality, and without this Government business, Esso would have had no lucrative return on its tanks, and made no money with which to pay its personnel."

This latter statement of facts may be supplemented from the record in the case at bar which discloses that during the month of January, 1944, 2,840,529 gallons of aviation gasoline were received into storage in the tanks at Memphis (both the tanks owned by Esso and the tanks leased from Lion Oil Refining Company); 743,824 gallons from Esso's tanks were transported to the 70th Sub-Depot at the Memphis Municipal Airport by Esso in its own tank trucks; and 1,754,712 gallons from Esso's Tanks were delivered to common carrier trucks to be transported to various airfields in Tennessee, Arkansas, Mississippi and Alabama. The total service charge billed by Esso to the United States on the gallonage delivered during the month from its own tanks was $10,174.11, being at the rate of $.0066 per gallon for gasoline delivered to the Memphis Municipal Airport in its own trucks and $.0030 per gallon for gasoline delivered to common carrier trucks. (Complainant's Exhibit 36; R. 173-174, 441). These charges were fixed in Exhibit A-1 to the service contract relating to the use of Esso's tanks. (Complainant's Exhibit 1; R. 113, 187, 329). During the same month there were delivered from the tanks leased from Lion Oil Refining Company 238,182 gallons, all to common carrier trucks for transportation to airfields in Arkansas, Mississippi and

Missouri, and the service charge on this gasoline was $.0018 per gallon or $428.73. (Complainant's Exhibit 37; R. 173-174, 442). This was the charge fixed in Exhibit A to the applicable service contract. (Complainant's Exhibit 2; R. 113, 187, 368). There was also a monthly use price of $450.00 for these tanks—the exact amount paid by Esso to Lion Oil Refining Company. (Complainant's Exhibit 2; R. 113, 187, 368; Complainant's Exhibit 34; R. 142, 401). During the same month there were deliveries of 28,334 gallons of gasoline at Knoxville for which a charge of 6.20¢ per gallon was made—this gasoline being delivered into the tanks of the airplanes. (Complainant's Exhibit 3; R. 113, 187, 378; Complainant's Exhibit 38; R. 173-174, 443).

It will be observed that in the Tennessee Oil Company case there was a charge for the use of the tanks of one dollar and a service charge of two cents per gallon. In the case at bar there was a charge for the use of some of the tanks of $450.00 per month and no charge for the use of the other tanks. The service charge was 3/10 of a cent per gallon on most of the gasoline involved, and an average of only a fraction of a cent per gallon on all the gasoline involved. It is submitted that these differences do not justify the classification.

Another difference between the Tennessee Oil Company case and the case at bar, which is suggested by the State Supreme Court, is that in the case at bar "the vast amount of gasoline involved" resulted in a "lucrative return on its tanks" to Esso. We feel that we need not comment on this difference in the two cases except to say that if the appellant is to be charged a tax of seven cents per gallon for obtaining a return on its tanks of a fraction of a cent per gallon for the privilege of storing someone else's gasoline, the business would not be lucrative. The business would be lucrative under these facts only if the tax could be passed on to the owner. The State Supreme Court, however, as heretofore pointed out, disclaimed any intention

to tax appellant *because* the tax was to be passed on. For the purposes of the argument on this point we assume that appellant would have been taxed even if it had no contract for reimbursement.

The remaining difference suggested by the State Supreme Court is that in the Tennessee Oil Company case the contract with the owner stated that the distributor's tank which was to be used for storing the gasoline was being "leased," with the result that the distributor was an "agent" of the owner and not an "independent contractor."

The Court's language in suggesting the above difference is susceptible of two constructions: (1) that Tennessee Oil Company's nonliability was derived from the tax exempt status, under state law, of the Obion County Board of Education, which was the owner of the gasoline; or (2) that irrespective of the tax exempt status of the owner of the gasoline, a bailee is not liable for the tax where the tank is "leased" to the owner of the gasoline, but is liable if the tank is not "leased."

For the purposes of the argument of this point we disregard the first construction of the Court's language, viz., that Tennessee Oil Company was not liable because the owner of the gasoline was tax exempt. We have heretofore pointed out that such construction would mean, as a matter of state law, that the legal incidence of the tax is on the owner of the gasoline; otherwise the bailee could derive no benefit from the tax exempt status of the owner. If the legal incidence of a tax is on the owner, and if the tax is collected from the bailee only for administrative or other practical reasons, it is too clear for argument that the tax cannot be legally collected where the United States is the owner.

The second construction of the Court's language must accordingly be accepted in order to give meaning to the Court's decision, viz., the construction that the tax exempt status of the owner of the gasoline is immaterial, but that

distributor-bailees become liable for the tax when they fail to "lease" their tanks to the owner of the gasoline which they are storing, but are not liable for the tax when they do "lease" their tanks to the owner. It is submitted that this classification is wholly illusory, arbitrary and invidious when applied to the facts here under consideration.

In the Tennessee Oil Company case the tank which was used was one of four located at the distributor's bulk plant so that, as a practical matter, the possession of the tank must have remained as it was; and the clear implication is that the distributor's own personnel handled the receipt and storage of the gasoline and its delivery to the Obion County Board of Education on order of the Board. Similarly, in the case at bar, the tanks remained in the possession of Esso and Esso's own personnel handled the receipt, storage and delivery of the gasoline. If the tank was "leased" in the one case it was "leased" in the other. (Cf. terminology of witnesses, R. 88-93; 105-106; 190). A classification for tax purposes cannot be constitutionally based on the mere use of a word in one contract and its omission in other contracts, where the activities conducted in performance of the contracts are substantially the same.

Nor can the classification be supported on the theory that in the Tennessee Oil Company case the bailee was the "agent" of the owner rather than an "independent contractor." If Tennessee Oil Company was an agent of the Obion County Board of Education, under the facts outlined by the Court, Esso was an agent of the United States. It may be observed that the Court took liberties in using the word "agent" in this connection. No agency in the legal sense was involved in the acts of receiving, storing and delivering the gasoline.

A valid classification for tax purposes must be based upon substance rather than upon words which may have different meanings, such as "lease" and "agent." "The same words may have different meanings in different parts

of the same act. . . ." (*Lamar* v. *U. S.*, 240 U. S. 60, 65). Thomas Hobbes has warned that the wise man has "need to remember what every name he uses stands for, and to place it accordingly, or else he will find himself entangled in words, as a bird in lime-twigs; the more he struggles, the more belimed."[1] And, as said by Mr. Justice Holmes, ". . . we must constantly translate our words into the things for which they stand."[2] Where ambiguous words are used in a statute, or read into a statute by the court which construes it, so that a tax administrator or a court may in one case select one meaning and in another case a different meaning, thereby exempting one taxpayer and taxing the other, although the facts are substantially the same, the classification is no less arbitrary, illusory and invidious than if the statute expressly authorized such discrimination.

In the Statement Opposing Jurisdiction it was contended by appellee that the State Court "did not entertain" the Fourteenth Amendment question and "did not decide it." We submit that counsel for appellee were in error in this assertion. The second part of the petition to rehear was confined to the contention that, as construed by the Court, Code Sections 1126 et seq. deny Esso the equal protection of the laws guaranteed by the Fourteenth Amendment and are unconstitutional and void because there is no reasonable basis for the classification made by the Court. In the reply to the petition, appellee insisted (R. 23) that this contention came too late. In denying the second part of the petition to rehear, the Court did not so hold, but said that it was a "re-argument," and that there was "nothing in the re-argument to change our former opinion." (R. 25). This can only mean that the Court had, before rendering the former opinion, considered possible constitutional ob-

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[1] Quoted by Jerome Frank, "A Lawyer Looks at Language," in "Language in Action" by S. I. Hayakawa, New York, Harcourt, Brace and Company, 1939, p. 325.

[2] Ibid., p. 322.

jections to the statute, as construed by the Court, and would not have so construed the statute if such construction, in the opinion of the Court, rendered it unconstitutional.

Moreover, for the reasons pointed out in the Statement as to Jurisdiction, the Fourteenth Amendment question would be properly before this Court even if the Supreme Court of Tennessee had refused to entertain this part of the petition to rehear.

CONCLUSION

In conclusion it is submitted that the judgment of the Supreme Court of Tennessee should be reversed and the case remanded to that Court with directions that judgment be entered in Esso's favor for the tax paid under protest, with interest and costs.

Respectfully submitted,

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February 18, 1953.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 330

ESSO STANDARD OIL COMPANY,
Appellant,

vs.

JAMES CLARENCE EVANS, COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE, ET AL.

APPEAL FROM THE SUPREME COURT OF TENNESSEE

STATEMENT OPPOSING JURISDICTION

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Of Counsel.

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IN THE SUPREME COURT OF THE STATE OF TENNESSEE

ESSO STANDARD OIL COMPANY,
Plaintiff-Appellant,

vs.

JAMES CLARENCE EVANS, COMMISSIONER, ETC.,
Defendant-Appellee

STATEMENT BY APPELLEE OF GROUNDS IN OPPOSITION TO APPELLATE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES PURSUANT TO SUPREME COURT RULE 12.

The appellee states the following matters and grounds against the jurisdiction of this Court as asserted by the appellant herein, in its statement of the basis of the appellate jurisdiction, filed herein on the 8th day of August, 1952, as required by Rule 12 of the Supreme Court.

I

Implied Constitutional Immunity

The principle of implied constitutional immunity relied upon by appellant to confer appellate jurisdiction upon this Court is frivolous and unsubstantial, the question having been settled by the Supreme Court of the United States in a number of cases adversely to the contention of appellant here.

The appellant sought to avoid payment of the privilege tax on the storage of gasoline imposed by the State of Ten-

nessee upon the basis that this gasoline was the property of the United States. The Supreme Court of the State of Tennessee in construing the gasoline tax stated that it was "a privilege tax on the engaging in the business of storing gasoline" (Opinion of the Supreme Court, p. 6). As contrasted with this, the Supreme Court of Tennessee held the gasoline inspection fee to be a tax laid upon the commodity itself, the gasoline, as an excise tax (Opinion of the Supreme Court of Tennessee, p. 5). The Supreme Court of Tennessee then held that the inspection fee, being a tax on the commodity itself, which belonged to the United States, would not lie; but the privilege exercised by the appellant, a private corporation, of engaging in the business of storing gasoline was a privilege for which the appellant had to pay the tax.

That the tax levied on the privilege of storing gasoline was a privilege tax exacted for the privilege of engaging in such business, *i.e.*, storage, was recognized by the Supreme Court of the United States in the case of *N. C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 77 L. Ed. 730. The Supreme Court of the State of Tennessee having construed the State Taxing Act, such construction is not subject to review.

Thus the tax in question was not a property tax levied against property belonging to the United States, but was a privilege tax levied against the appellant for engaging in the business of storing gasoline and receiving compensation therefor, regardless of who owned the gasoline. The question has been conclusively settled by the Supreme Court of the United States that the mere fact that the gasoline was the property of the United States, or that the economic burden might pass to the United States, would not give immunity to appellant, a private corporation, from taxation by the State on the privilege of engaging in the business of storage of such gasoline.

Under the rules of law which formerly prevailed; probably the appellant would have been immune from the taxes here sought to be imposed. This is clearly shown by the case of *Panhandle Oil Co.* v. *Mississippi*, 72 L. Ed. 857. There the question involved was whether or not the State of Mississippi could impose a privilege tax on gasoline distributors measured by their gallonage, which gallonage included sales to the United States for the use of the Coast Guard Fleet and the Veterans Hospital. The Supreme Court of the United States speaking through Mr. Justice Butler, held that it was immaterial that the seller and not the purchaser was required to report and make payment to the state, and that since the tax depended upon the number of gallons the effect of the tax was to retard and burden the exertion by the United States of its constitutional powers. Therefore, the tax was invalid. This was upon the theory of the old *M'Culloch* v. *Maryland*, 4 L. Ed. 608. Mr. Justices Holmes, Brandeis, Stone and McReynolds all dissented. In the later case of *Graves* v. *The Texas Co.*, 298 U. S. 393, 80 L. Ed. 1236, the Supreme Court of the United States had before it an Alabama Excise or Privilege Tax levied upon storers of gasoline which accrued at the time of the withdrawal from storage. Some of this gasoline was withdrawn and sold to the United States for the use and performance of governmental functions. Again the Supreme Court of the United States speaking through Mr. Justice Butler, held that the state tax on storing measured by the gallons withdrawn for sale or other use when measured by gasoline withdrawn and sold to the United States infringed the constitutional principle safeguarding the Federal Government from state taxation. Mr. Justices Cardozo and Brandeis dissented.

The first whittling at the rule of the *Graves* and *Panhandle* cases came in the case of *James* v. *Dravo Contracting*

Co., 82 L. Ed. 125, 58 S. Ct. 208, 114 A. L. R. 318. In that case the Dravo Contracting Co. had a contract with the United States to build locks and dams in certain navigable rivers located in West Virginia. West Virginia levied an occupation tax against contractors measured by gross income and sought to include in gross income the amount paid to Dravo by the United States. The Supreme Court of the United States, through Mr. Chief Justice Hughes, held that such was not a direct tax or direct burden on the Federal Government even though the imposition of the tax might increase the cost to the Government, and that, therefore, the tax was valid. With respect to the *Panhandle* case and the *Graves* case the Court held that:

> "These cases have been distinguished and must be deemed to be limited to their particular facts."

Finally, in 1941, in the case of *State of Alabama* v. *King & Boozer*, 314 U. S. 1, 86 L. ed. 3, the Supreme Court of the United States, speaking through Mr. Chief Justice Stone, overruled the Panhandle case and the Graves case. In the King & Boozer case the State of Alabama had a sales tax under which the seller was chargeable, but was required to collect from the buyer a tax for goods sold. King & Boozer had a contract with the United States to build an Army camp. This contract was a cost plus a fixed fee contract. The State of Alabama under its state sales tax sought to require King & Boozer to pay the state sales tax on all materials which they purchased for use in the construction of the camp. The Court, speaking through Mr. Chief Justice Stone, said:

> "Congress has declined to pass legislation immunizing from state taxation contractors under 'cost-plus' contracts for the construction of governmental projects. Consequently, the participants in the present transaction enjoy only such tax immunity as is afforded by the Constitution itself, . . ."

The Court further said:

> "So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the Government, this is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right to the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see Panhandle Oil Co. v. Mississippi and Graves v. Texas Co., supra, we think it no longer tenable."

On the same date the Supreme Court of the United States determined the case of *John C. Curry* v. *United States of America*, 314 U. S. 14; 86 L. ed. 9. In that case the Court had before it an Alabama Use Tax. The tax provided "An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased at retail . . . for storage, use or other consumption in this state at the rate of 2 per cent of the sales price of such property."

Again, it was the situation of contractors building an Army camp for the United States on a cost-plus contract basis. They had purchased roll roofing outside the state and brought into the state where they used the same in the performance of their construction contract with the Government. The Supreme Court of the United States, speaking through Mr. Chief Justice Stone, said that:

> "For the reasons stated at length in the King & Boozer case we think that the contractors, in purchasing and bringing the building material into the state and in appropriating it to their contract with the government, were not agents or instrumentalities of the government; and they are not relieved of the tax,

to which they would otherwise be subject, by reason of the fact that they are government contractors."

Going further, the Court said:

"If the State law lays the tax upon them (the contractors) rather than the individual with whom they enter into a cost-plus contract like the present one, then it affects the government, like the individual, only as the economic burden is shifted to it through operation of the contract. As pointed out in the opinion in the King & Boozer case, by concession of the Government and on authority, the constitution, without implementation by Congressional legislation, does not prohibit a tax upon Government contractors because its burden is passed on economically by the terms of the contract or otherwise as a part of the construction cost to the Government."

Thereafter, there seemed to have been some confusion as to whether or not the Supreme Court of the United States intended to overrule the Panhandle case and the Graves case. The Court attempted to lay this question to rest in the case of *Penn. Dairies* v. *Milk Control Commission*, 318 U. S. 261, 63 S. Ct. 617, 87 L. Ed. 748, when the Court said with respect to certain opinions of the Comptroller General:

"All rest on the reasoning of the Panhandle Oil Co. v. Knox, 277 U. S. 218, and like cases, which were overruled in Alabama v. King & Boozer, supra."

Subsequent to the Dravo case, but prior to the decision in the King & Boozer case, the Supreme Court of North Dakota held in the case of *Federal Land Bank* v. *De Rochford*, 69 N. D. 382, 287 N. W. 522, that a tax on the sale of motor vehicle fuel to a Federal Land Bank was valid.

The Mississippi Supreme Court, in 1940, immediately prior to the King & Boozer case, held in the case of *Com-*

press of Union v. *Stone*, 188 Miss. 49, 193 Sou. 329, that a gross income tax applied to receipts from the compressing of cotton for the Commodity Credit Corporation, which was a wholly owned Federal instrumentality, was a valid tax.

In 1943 the Supreme Court of Florida, in the case of *United States* v. *Lee*, 153 Fla. 94, 13 Sou. (2d) 19, held that a privilege tax levied on the vendor of gasoline, which privilege tax applied to the vendor even though the sale of gasoline was to the United States, was a valid tax.

Where the Federal Congress has by specific enactment immunized from state taxation activities in furtherance of one of its instrumentalities, then such immunization is good. Such was the holding of the Supreme Court of the United States in an opinion by Mr. Justice Murphy in the case of *Federal Land Bank* v. *Bismark Lumber Co.*, 314 U. S. 95, 86 L. Ed. 65. The Court, however, in this case did not discuss what would have been the effect of such a tax if Congress had not so immunized the transaction and laid its decisions squarely on the fact that such immunization had been granted by specific Congressional enactment.

In the case at bar there is no claim made of any congressional immunization, the reliance being solely upon implied immunity.

In the case of *Penn. Dairies* v. *Milk Control Commission*, 318 U. S. 261, 87 L. Ed. 748, the Supreme Court of the United States was faced with the question of whether or not the minimum price regulations of the State of Pennsylvania could constitutionally be applied to the sale of milk by a dealer to the United States, the sale being consummated within the territorial limits of the state and in a place subject to its jurisdiction. The Court held, speaking through Mr. Chief Justice Stone, that the Congress could have immunized the government from such state regulation by declaring the same inapplicable to sales to the government, but that in the absence of such immunization by spe-

cific enactment, nondiscriminatory taxation or regulation of a contractor with the government was not invalid even though it imposed an increased economic burden on the government, this on the authority of the King & Boozer and other cases. Going further, the Court had this to say:

> "The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself, and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on the citizens of the United States within the states' borders. See Metcalf and Eddy v. Mitchell, supra (296 U. S. 523, 524, 70 L. ed. 392, 393, 46 S. Ct. 172). And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system, . . ."

Mr. Justice Douglas wrote a dissenting opinion in which Messrs. Justice Black and Jackson joined, but the dissent in this case was based on the proposition that Congress had indirectly required competitive bidding with respect to the purchase of all supplies and that this, in and of itself, was sufficient immunization by Congress from any minimum price regulation.

In the case of *Mayo* v. *United States*, 319 U. S. 441, 87 L. Ed. 1504, the Supreme Court of the United States was confronted with this situation. The State of Florida had a commercial fertilizer inspection law by the terms of which

every bag of fertilizer had to be inspected and an inspection fee paid before the same could be distributed. The United States Government, under its soil conservation program, purchased fertilizer outside of the State of Florida and put the same into the State of Florida there to be distributed by it as a part of the program. The State of Florida sought to stop the distribution by the United States of the fertilizer which belonged to the United States on the ground that the same was not inspected. The Supreme Court of the United States, speaking through Mr. Justice Reed, held that this could not be done because this was *a direct inspection fee charged to the United States Government* for inspecting property belonging to the United States Government. The Court's language was as follows:

> "These inspection fees are laid directly upon the United States. They are money exaction the payment of which, if they are enforceable, would be required before executing a function of government. Such a requirement is prohibited by the Supremacy Clause. We are not dealing as in Graves v. New York, supra, with a tax upon the salary of an employee, or as in Alabama v. King & Boozer, 314 U. S. 1, 86 L. ed. 3, 62 S. Ct. 43, 140 A. L. R. 615, with a tax upon the purchases of a supplier, or as in Penn. Dairies v. Milk Control Commission, No. 399, October Term, 1942, decided March 1, 1943 (318 U. S. 261, ante, 78, 63 S. Ct. 617), with price control exercised over a contractor with the United States. In these cases the exaction directly affected persons who were acting for themselves and not for the United States. These fees are like a tax upon the right to carry on the business of the Post Office or upon the privilege of selling United States bonds through Federal officials."

The distinction between the case of *Mayo* v. *United States* and the case at bar is clear. If Tennessee sought to tax the gasoline which was stored, the tax would be invalid. In like

manner, if the United States was storing the gasoline in its own tanks, the tax would be invalid; but in this case the tax is on appellant for the privilege of storing the gasoline.

The Supreme Court of the State of Tennessee recognized this distinction when it refused to permit the exaction of an inspection fee because the same was a direct tax upon the commodity, as contrasted with the privilege tax on appellant for exercising the privilege of storing gasoline.

The distinction is borne out by the Supreme Court of the United States in the case of *United States* v. *Allegheny County*, 322 U. S. 174, 64 S. Ct. 908, 88 L. Ed. 1209. In the *County of Allegheny* case Mesta Machine Company, located just out of Pittsburgh in Allegheny County, had a contract with the United States Government to manufacture big guns for ordnance. The United States Goverment owned certain of the machinery used in the manufacture. Allegheny County sought, under its property tax, *an ad valorem tax*, to tax to Mesta Machine the value of the machines owned by the United States. The Supreme Court of the United States, speaking through Mr. Justice Jackson, held, first, that the title to the property in question was in the United States and is effective for tax purposes. After making this holding, it found that the assessment against Mesta for the ad valorem property tax was increased, based upon the value of the machinery owned by the United States. The Court held that the ad valorem tax was not a form of personal taxation "*but rather as a tax against the property as a thing*". The Supreme Court of the United States' complete description of the transaction and its holding is contained in the following language:

> "The assessors made no claim that the temporary presence of the Government's machinery actually enhanced the market value or the use value of Mesta's land. The assessors simply and forthrightly valued Mesta's land as land, and the Government's machines

as machinery, and added the latter to the former. We discern little theoretical difference, and no practical difference at all, between what was done and what would be done if the machinery were taxed in form. Its full value was ascertained and added to the base to which the annual rates would apply for county, city, borough, town, township, school, and poor purposes.

"We hold that the substance of this proceeding is to lay an ad valorem general property tax on property owned by the United States."

In the case of *Smith* v. *Davis*, 323 U. S. 11, 89 L. Ed. 107, contractors with the United States Government sought to exclude from their assessment for ad valorem purposes the amount of an open account claim against the United States Government. The Supreme Court of the United States held that, of course, this was improper and that the ad valorem tax applied. The Court said:

"That this asset involves a claim against the Federal Government is no more fatal to the validity of the tax than the fact that in James v. Dravo Contracting Co. (Citation) the tax was levied on the contractor's gross receipts from the United States or the fact that in Alabama v. King & Boozer (Citation) the sale tax was placed on the sale of property to a contractor for use in a Federal project. *The assets of an independent contractor that are derived from the profits of a government contract stand in no preferred constitutional position so far as taxation is concerned.*" (Emphasis ours.)

The clearest case on the point involved here is the case of *Wilson* v. *Cook*, 327 U. S. 474, 90 L. Ed. 793, where the Supreme Court of the United States was confronted with the question of whether or not a privilege tax upon each person engaged in the business of severing from the soil for commercial purposes natural resources, including timber, was applicable to contractors severing timber belonging to

the United States from land belonging to the United States within the State of Arkansas where title to the timber remains in the United States until the same had been paid for after being severed.

The statute had a further provision in it to the effect that the severer was required to collect the tax from the owner of the timber at the time of severance and gave the state a lien on the land from which the lumber was severed. With respect to the tax itself, the Court held:

> "Our decision in James v. Dravo Contracting Co. (Citation) and in Alabama v. King & Boozer (Citation) and the cases cited in these opinions, can leave no doubt that the Supreme Court of Arkansas correctly held that plaintiffs, *who are taxed by the state on their activities in severing lumber from government lands* under contract with the government, cannot claim the benefit of the implied constitutional immunity of the Federal Government from taxation by the state." (Emphasis ours.)

With respect to the additional questions concerning the lien, the Court held that this had not been correctly raised in the State Court and was not properly before it and that, therefore, it could not make any determination respecting this question.

In the recent case of *Oklahoma Tax Commission* v. *Texas Co.*, and *Oklahoma Tax Commission* v. *Magnolia Petroleum Co.*, 336 U. S. 342, 69 S. Ct. 561, 93 L. Ed. 721, the Supreme Court had before it an Oklahoma Statute imposing two taxes upon the production of petroleum within the State, one a tax on the gross value of production in lieu of all other local ad valorem property taxes and another an excise tax on every barrel of petroleum produced. The Oklahoma Tax Commission assessed both taxes against lessees of mineral rights in allotted and restricted Indian lands. The State Supreme Court of Oklahoma, feeling itself bound by former

decisions of the United States Supreme Court, held the assessments to be invalid on the ground that the lessee was an instrumentality of the Federal Government. In an opinion by Mr. Justice Rutledge the Supreme Court reviewed the change in theory on the doctrine of governmental immunity, quoting the provision from the *King & Boozer* case, as follows:

> ". . . The Constitution, unaided by Congressional legislation . . . (does not prohibit) a tax exacted from the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as a part of the construction cost to the Government. So far as such a nondiscriminatory State tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity."

Mr. Justice Rutledge, in speaking of a previous decision on which the Texas Company relied, said:

> "Since that decision, as we have noted, the process has been reversed in direction. True inter-governmental immunity remains for the most part. But, so far as concerns private persons claiming immunity for their ordinary business operations (even though in connection with governmental activities), no implied constitutional immunity can rest on the merely hypothetical interferences with governmental functions here asserted to sustain exemption."

A recent District Court case on the subject is the case of *Broadhead* v. *Borthwick*, 174 F. (2d) 21, certiorari to the Supreme Court of the United States denied October 17, 1949, 338 U. S. 847, 70 S. Ct. 87, 94 L. Ed. 518. In that case,

under the Hawaii General Excise Tax Act, an excise tax was imposed on every person engaged in the business of selling any tangible personal property. These excise taxes were imposed upon Broadhead on sales made by Broadhead to Army Post Exchanges and Naval Ship Stores. The Federal District Court, in sustaining the Supreme Court of Hawaii's decision upholding the General Excise Tax as involved here, held:

> "It is clear that before 1942 or before any of the instant taxes accrued, as well as also later, the United States Supreme Court had in a series of decisions overruled the ban previously promulgated by the Panhandle case. See James v. Dravo Contracting Co. (Citation), State of Alabama v. King & Boozer (Citation), Curry v. United States (Citation), Penn. Dairies v. Milk Control Commission (Citation); in which last opinion in 1943 the Supreme Court definitely states that the Panhandle doctrine was overruled by State of Alabama v. King & Boozer, 1941, supra."

The question of the extension of the doctrine of governmental immunity to a private contractor from taxes levied against it simply because it is engaged in a contract with the United States, having been conclusively settled in a number of cases, the asserted Federal question is frivolous and not substantial so that there is no jurisdiction for a hearing of the appeal in this case.

Patterson v. *Stanolind Oil & Gas Co.*, 305 U. S. 376, 59 S. Ct. 259, 83 L. ed. 231;

Seaboard Air Line R. Co. v. *Watson*, 287 U. S. 86, 53 S. Ct. 32, 77 L. ed. 180;

Deming v. *Carlisle Packing Co.*, 226 U. S. 102, 33 S. Ct. 80, 57 L. ed. 140.

II

The Fourteenth Amendment

The assertion that the equal protection clause of the Fourteenth Amendment was violated is insufficient to confer jurisdiction upon this Court for two reasons: In the first place, this question was not properly raised in the State Court nor decided by it; and in the second place, it is clearly a frivolous and unsubstantial assertion.

This assertion was first raised by appellant on a petition to rehear after the decision of the Chancellor had been affirmed by the Supreme Court of the State of Tennessee. It is based upon the premise that the Supreme Court of the State of Tennessee in the case of *Tennessee Oil Company* v. *Commissioner*, 178 Tenn. (14 Beeler) 683, 162 S. W. (2d) 1081, app. dis. 63 S. Ct. 34, 317 U. S. 588, 87 L. Ed. 482, determined that there was no liability for a tax, whereas, in the instant case it determined there was liability.

The Supreme Court of the State of Tennessee in the case of *Tennessee Oil Company* v. *Commissioner*, supra, expressly held that it would not consider a federal constitutional question raised for the first time in the litigation on a petition to rehear, and has consistently followed such ruling, excepting where the question is raised on the Court's own motion. As a result of this well established Tennessee procedural rule, the Supreme Court of the United States sustained the motion to dismiss the appeal in the *Tennessee Oil Company* v. *Commissioner* case "for want of a properly presented Federal question". (317 U. S. 588, 63 S. Ct. 34, 87 L. Ed. 482)

In like manner the Supreme Court of the United States has held that an attempt to raise a Federal question in a State Court upon a petition for rehearing does not furnish a basis of review by the Supreme Court of the United States,

unless the State Court actually entertains the question and decides it.

(*Godchaux Co.* v. *Estopinal*, 251 U. S. 179, 40 S. Ct. 1116, 64 L. Ed. 213.)

In the case at bar the State Court did not entertain the question and did not decide it and had, as above pointed out, previously held that it would not entertain such question raised for the first time on a petition to rehear.

In addition, as pointed by the Supreme Court of Tennessee in construing its own opinion in the case of *Tennessee Oil Company* v. *Commissioner*, that case was clearly distinguishable from the instant, that is, on the facts. The Supreme Court of Tennessee pointed out that Tennessee Oil Company was there storing gasoline as an agent or servant of the Board of Education, an exempt agency, and that the legal effect was that the Board of Education, the exempt agency, was storing gasoline in its own tank. The Supreme Court of Tennessee in construing the State Act and the factual situations involved found that in one instance the Tennessee Oil Company was not exercising the privilege taxed by the State Taxing Act under its terms, but that in another case, the instant case, on entirely different and distinguishable facts appellant was exercising the privilege and was subject to the taxing act.

This was clearly a matter to be determined by the State Court in construing the laws of the State as applied to different factual situations and the attempt by appellant to impute to the Supreme Court of Tennessee a purpose to afford unequal protection of the laws is frivolous and without merit.

An argument that because one who is found by the Court not to be exercising the privilege taxed, is not taxed, and another who is found to be exercising the privilege taxed, is taxed, equal protection of the laws is not afforded is

spurious, frivolous, unsubstantial and certainly not the foundation for review by the Supreme Court of the United States.

Respectfully submitted,

Dated August 14, 1952.

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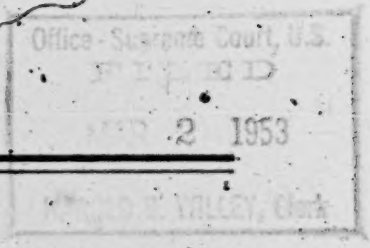

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. 330.

ESSO STANDARD OIL COMPANY,
Appellant,

vs.

JAMES CLARENCE EVANS, Commissioner, etc.,
Appellee.

On Appeal from the Supreme Court of the State of Tennessee.

BRIEF FOR THE APPELLEE, JAMES CLARENCE EVANS, ETC.

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BRIEF FOR THE APPELLEE, JAMES CLARENCE EVANS, ETC.

REFERENCE TO OPINIONS BELOW AND GROUNDS OF JURISDICTION.

Appellee adopts the "Reference to Opinions Below" and "Grounds of Jurisdiction" as stated in appellant's brief (Brief on behalf of appellant Esso Standard Oil Company, pp. 1-2).

STATEMENT OF THE CASE.

Appellee adopts the "Statement of the Case" as stated in appellant's brief (Brief on behalf of appellant Esso Standard Oil Company, pp. 2-3), excepting that statement that no assertion of tax liability was made by Tennessee until a retroactive assessment was made in 1949. The truth is, as shown by the record and as found by the Supreme Court of Tennessee (if it be material on this appeal, we submit that it is not), that while no steps were taken to collect the tax until 1949, the matter was under discussion on several occasions between representatives of Esso and Tennessee and no decision reached as to liability (R. 211-217, 278).

STATUTES INVOLVED.

It is true, as pointed out by appellant, that the portions of the statutes involved are set forth in the appendix to the brief for the United States in **United States of America v. James Clarence Evans, Commissioner, etc.**, Docket No. 378. With the construction of those statutes given by appellant, however, we cannot agree.

The Supreme Court of Tennessee has correctly construed the applicability of the Tennessee statutes and has found that appellant, Esso, was liable for the tax as a distributor of gasoline engaged in the business of storing gasoline, which is the privilege taxed (R. 8-10). The tax was levied against Esso under the statute since it was the first to exercise the taxable privilege of storing gasoline.

Under the express language of the Statute involved the gasoline is not taxed, the storage tanks are not taxed and the ownership of the gasoline is not taxed; it is the privilege of engaging in the business of storing gasoline, which Esso was admittedly doing, that is taxed (Code of Tennessee, Sections 1126, 1127; Brief for the United States, Docket No. 378, Appendix pp. 54-56).

SUMMARY OF ARGUMENT.

The tax involved, being a true privilege tax levied against a private corporation, Esso, which admittedly was storing the gasoline as a private contractor, does not violate any principle of implied constitutional rights.

The fact that the tax was not applicable in a factual situation entirely distinguishable does not violate the equal protection clause of the Fourteenth Amendment; nor was such question properly raised and presented so as to be ruled upon by the State Court, although appellant had ample opportunity to do so.

ARGUMENT.

Substantially the same argument as is made by appellant, Esso, here, is being made by the intervenor, appellant, United States, in its appeal, Docket No. 378. In order not to burden this Court with repetition, we, therefore, adopt in its entirety our argument as set forth in our reply brief in that appeal.

We would especially challenge to the attention of this Court the attempt made by this appellant, Esso, to confuse the clear issue by the assertion that the question of the liability of a bailee arose here only because the tax could not be collected from the owner (Brief on behalf of appellant Esso Standard Oil Company, pp. 8-9).

This assertion obviously overlooks the basic premise that the ownership of the gasoline is not taxed but that the storing is, and appellant, Esso, admittedly did the storing, was the first to do so, and so was the proper subject of the privilege tax.

In an attempt to rely upon the cases pertaining to proper classification appellant insists that it, like Tennessee Oil Company, in the case of **Tennessee Oil Company v. McCanless**, 178 Tenn. (14 Beeler) 683, is a "distributor". (Brief on Behalf of Appellant Esso Standard Oil Company, pp. 9-10.) Again the obvious fallacy is that while both may be "distributors", they were not both doing the same thing. In the **Tennessee Oil Company v. McCanless**, supra, situation the Tennessee Supreme Court found that the exempt agency and not Tennessee Oil Company was doing the storing, whereas here, appellant, Esso, as an independent contractor, was doing so (R. 9).

Tennessee Oil Company was not a bailee and was not considered as such by the Tennessee court, but on the contrary was an agent or servant of the exempt agency, a

status which appellant, Esso, does not occupy here, and for that reason appellant's argument based upon such a premise must fail (Brief on Behalf of Appellant, Esso Standard Oil Company, p. 12).

CONCLUSION.

For the reasons set forth herein and for the reasons and upon the authorities cited and considered in our reply brief in Docket No. 378, which for the sake of brevity are adopted herein by reference, appellee respectfully submits that the judgment and decree of the Supreme Court of Tennessee should be affirmed.

Respectfully submitted,

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Dated February 26, 1953.

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NO. 378

In the Supreme Court of the United States

OCTOBER TERM, 1952.

UNITED STATES OF AMERICA, *Appellant*,

v.

JAMES CLARENCE EVANS, Commissioner of Finance and Taxation of the State of Tennessee, JOHN F. KISER, His successor in office, and J. M. DICKINSON, Present Commissioner of Finance and Taxation.

Appeal from the Supreme Court of the State of Tennessee.

STATEMENT AS TO JURISDICTION.

IN THE SUPREME COURT OF THE STATE OF TENNESSEE

Davidson Equity.

ESSO STANDARD OIL COMPANY AND UNITED STATES OF AMERICA, *Appellants*

v.

JAMES CLARENCE EVANS AND HIS SUCCESSORS IN OFFICE AS COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE, *Appellee*

STATEMENT AS TO JURISDICTION.

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, the United States of America, intervenor-appellant, submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court of Tennessee entered in this cause.

OPINION BELOW

The opinions of the Supreme Court of Tennessee and of the Chancellor in the Chancery Court

at Nashville are not reported. Copies of these opinions are attached hereto in Appendix A and B,* respectively.

JURISDICTION

1. The judgment of the Supreme Court of Tennessee was entered on June 7, 1952. A petition to rehear, seasonably filed by appellant Esso Standard Oil Company on June 16, 1952, was entertained and denied with an opinion on July 11, 1952. The jurisdiction of the Supreme Court of the United States to review these decisions by direct appeal is conferred by Title 28, United States Code, Section 1257(2) and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. *United States* v. *Allegheny County*, 322 U.S. 174, 191; *United States* v. *Burnison*, 339 U.S. 87; *Penn Dairies, Inc.* v. *Milk Control Commission of Pennsylvania*, 318 U.S. 261; *Pacic Coast Dairy, Inc.* v. *Department of Agriculture of California*, 318 U.S. 285; *Standard Oil Company* v. *Johnson, Treasurer of California*, 316 U.S. 481.

2. In its bill of complaint, Esso Standard Oil Company alleged that "the Tennessee gasoline

* (Clerk's Note—These opinions are printed as an appendix to the Statement as to Jurisdiction in Esso Standard Oil Co. v. Evans, No. 330 O.T. 1952 and are not reprinted here).

tax law," if construed to cover this case, "is invalid and void because it is repugnant to the Constitution of the United States" (par. XIX), that the assessment of the tax "is illegal and void for the reasons that such assessment is upon the exclusive property or instrumentality of the United States which is immune from taxation by the State of Tennessee under the Constitution of the United States" (par. XX), that the assessment "imposes a tax on property which is an instrumentality of the United States and constitutes an unconditional imposition upon the United States" (par. XXI), and that the Commissioner of Finance and Taxation "has applied these provisions of the Tennessee gasoline tax laws in a manner which renders that law invalid under the Constitution of the United States" (par. XXII). In intervening, the United States adopted these allegations. The Chancery Court ruled against these contentions (Appendix B). The contentions that the state gasoline tax statute and the assessment of the tax were illegal and void under the federal Constitution, because in conflict with the immunity of the United States from state taxation, were preserved on appeal to the Supreme Court of Tennessee by assignments of errors filed by Esso Standard Oil Company and adopted by the United States. The Supreme Court of Tennessee ruled adversely to these contentions (Appendix A).

With respect to the contention that the statute, as applied, unconstitutionally discriminates against Esso and the United States, and violates the Equal Protection Clause of the Fourteenth Amendment (which provision was first specifically mentioned in Esso's petition to rehear in the Supreme Court of Tennessee), the United States adopts the statement made by Esso Standard Oil Company in its Statement as to Jurisdiction heretofore filed in the cause, to the effect that the Equal Protection and discrimination issues were seasonably raised. It was argued to the Supreme Court of Tennessee, in Esso's brief on the original hearing, that the court's prior decisions (particularly the case of *Tennessee Oil Co.* v. *McCanless*, 178 Tenn. 683) required a holding that the tax was inapplicable here. The brief added (p. 42): "Necessarily the same rule must be applied when the implied immunity of the United States is involved; otherwise Tennessee has discriminated against the United States." When the State Supreme Court refused to apply the "same rule" to the instant case, at the same time adhering to its prior decisions, the Equal Protection issue was raised in Esso's petition to rehear.

3. This Court has jurisdiction to consider those issues presented herein which may not be appliable under 28 U.S.C. 1257(2), but are reviewable by certiorari under 28 U.S.C. 1257(3), since all such issues are included in the Assignment of

Errors filed herewith. See *Flournoy* v. *Wiener*, 321 U.S. 253, 263; *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530, 547. See also 28 U.S.C. 2103.

QUESTIONS PRESENTED

1. Whether the Tennessee gasoline tax of seven cents per gallon, assessed against and collected from a Government contractor storing gasoline for the United States, is invalid under the Federal Constitution to the extent assessed with respect to gasoline owned by the United States.

2. Whether the Tennessee gasoline tax statute unconstitutionally discriminates against the United States in that, as construed by the State Supreme Court, it imposes a tax with respect to gasoline owned by the United States in circumstances where the same tax would not be levied if the gasoline were owned by others.[1]

STATUTE INVOLVED

The pertinent provisions of the Tennessee gasoline tax statute are set forth in Appendix C.

STATEMENT

This is a test suit by Esso Standard Oil Company, a contractor with the Government, to recover certain gasoline taxes assessed and collected from it by the State of Tennessee with respect to

[1] All the points raised in the Assignment of Errors are also presented. The Questions Presented stated above set forth the major issues.

Government-owned gasoline stored by Esso for the United States. The United States, which has agreed to reimburse Esso for taxes incident to its contract, intervened in the trial court in support of Esso and has since participated in the case.

1. During the time involved in this suit (January 1944), Esso was engaged in performing a contract with the United States by which it agreed to receive and store in its own facilities at Memphis, Tennessee, and in facilities leased for that purpose, gasoline belonging to the United States which was brought to Tennessee from without the State. At the direction of the Air Forces, Esso delivered the gasoline to an Air Force base in Tennessee, or delivered it to carriers employed by the United States for transportation to bases or points within or outside of Tennessee. For its services, depending on their scope, Esso received amounts ranging from .18 cents to 6.3 cents per gallon; the bulk of the payments were at the .18 cents rate.

In greater detail, the course of operations was as follows:—The gasoline—aviation gasoline—was produced in other States by several refineries, Esso being only one of them. Upon production, it became the property of Defense Supplies Corporation (DSC), a World War II subsidiary of Reconstruction Finance Corporation, and came, for allocation purposes, under the jurisdiction of the Petroleum Administration for War (PAW).

The gasoline involved here was allocated by PAW to the Army Air Forces for use at air bases and airfields in the South.

Upon presentation of the proper allocation certificates to its agents, DSC delivered the gasoline to an authorized property officer of the Army Air Forces, either at a refinery in Louisiana or Oklahoma or at the pipeline in East St. Louis, Illinois. The Air Forces would then arrange for transportation by barge to Memphis. This transportation generally was by outside carrier on a Government bill-of-lading, but not infrequently was on Government barges towed by a contract tug. The trial court found that "in the true sense, Standard Oil Company was neither consignee nor consignor, but that the substance of the transaction was that the government itself was the consignee of each of these shipments * * *."

Upon arrival in Memphis, the gasoline was pumped by Esso into its tanks. Commingling with Esso's own gasoline occurred only in minor quantities and then only in grade 91 octane. At that time, all supplies of the other grade—100 octane—were wholly owned by the Government, and the 100 octane grade constituted the bulk of the gasoline in controversy.

After storage, Esso delivered the gas only upon written direction by the Air Forces. Except for the relatively small gallonage delivered to the Memphis Air Base, the gasoline was placed by

Esso for delivery in tank trucks owned by the Government, or in similar trucks of carriers under contract with the Air Forces. A very substantial part of the gasoline was transported to air bases outside of Tennessee, in Mississippi, Arkansas, etc.

2. The Tennessee statutes impose a "special privilege tax" on all "distributors" of gasoline in the State, "for engaging in and carrying on such business in this State," "in an amount equal to seven cents for each gallon of gasoline * * * refined, manufactured, produced, or compounded by such distribution and sold, stored, or distributed by him in this State, or shipped, transported or imported by such distributor into, and distributed, stored or sold by him within the State * * *."

Although they had full knowledge of all the facts, and Esso presented the required reports, the Tennessee revenue officials did not seek to assess, collect or demand this tax from Esso until August 1949, some time after the completion of full performance of Esso's contracts with the United States. During the contracts' performance, both Esso and the United States were led to believe that no tax was due. Relying upon this administrative construction, the United States and Esso continued their arrangement through 1944 and in subsequent years.

3. As noted above, demand was first made in August 1949. Esso paid under protest the amount

demanded for the month of January 1944, and then brought this suit to recover. The Chancery Court disallowed certain inspection fees paid by Esso, and also disallowed interest and penalties, but held for the State on the gasoline tax itself (in the amount of $196,848.68). The State Supreme Court affirmed.

The arrangement between Esso and the United States began in 1943 and ended in 1946. The statute of limitations bars collection of the tax for 1943, but not for 1944, 1945, or 1946. The instant suit, involving only the month of January 1944, is a test case. If the ruling of the state courts as applied to the rest of 1944 and the succeeding years, the amount collected by the State for that period will amount to upwards of $3,800,000 (as calculated by the State). Including the judgment below, the amount is over $4,000,000.

THE QUESTIONS ARE SUBSTANTIAL

Tennessee has imposed a tax of 7 cents a gallon with respect to Government-owned gasoline for the storing of which Esso ordinarily received only .18 cents a gallon. The tax is sought to be supported as merely a privilege tax on Esso's business as a bailee of gasoline, but in this case it actually and in full effect is equivalent to the normal gasoline tax and amounts to an unconstitutional imposition upon the Government-owned gasoline. Moreover, Tennessee's taxing statute,

as construed by its highest court, discriminates in its incidence against the United States by taxing in circumstances where the same tax would not be levied if the gasoline were owned by another than the United States.

1. If the tax here is in substance on the Government's gasoline, it is clearly invalid under the Supremacy Clause and the established constitutional doctrine which immunizes the Federal Government from State taxes. As this Court said in *United States* v. *Allegheny County*, 322 U.S. 174, 177: "* * * unshaken, rarely questioned, and indeed not questioned in this case, is the principle that possessions, institutions and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of State taxation." "We hold that Government-owned property, to the full extent of the Government's interest therein, is immune from taxation, *either as against the Government itself or as against one who holds it as a bailee*" (p. 189) (emphasis supplied). See also *Mayo* v. *United States*, 319 U.S. 441, 447-8.

Though the State Supreme Court has characterized the tax as not on the gasoline but a "privilege tax" on Esso for storing gasoline in Tennessee,[2] and though the statute calls the levy "

[2] In *Tennessee Oil Co.* v. *McCanless*, 178 Tenn. 683 (1941) (discussed below), the court spoke as if the tax was imposed directly on the gasoline.

special privilege tax * * * for engaging in and and carrying on such business in the State * * *," this Court is entirely free to disregard such designations. It can decide for itself, despite the language used by the state legislature and the state courts, the true incidence and impact of the tax, and its effect upon the right of the United States. *Wisconsin* v. *J. C. Penney*, 311 U.S. 435, 443; *United States* v. *Allegheny County*, 332 U.S. 174, 184; *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69, 84; *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, 338 U.S. 665, 674. And this Court's inquiry is whether "in practical operation and effect" the tax is a tax on Government-owned gasoline, regardless of the "label employed in describing it." *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, *supra*, at pp. 673, 674.

Realistically viewed, the Tennessee tax as applied here is simply a tax on gasoline, equivalent to the gasoline taxes levied by most States, formally imposed in this instance on the bailee of the gasoline. A tax of 7 cents per gallon of Government gasoline obviously cannot be laid merely on Esso's storing business where Esso's compensation from the Government for carrying on that business is ordinarily only .18 cents per gallon. In "practical operation and effect," a heavy tax of this character, measured solely by gallonage

owned by someone else and taking no account of the taxpayer's gross or net receipts from its business or its expenses, does not tax the business at all. It is a plain imposition on the Government gasoline which flowed in and out of Esso's tanks.[3]

United States v. *Allegheny County*, 322 U.S. 174, 183-185, is a closely comparable case. There, the real property was owned by Mesta Machine Company, a Government contractor, and the affixed machinery belonged to the United States. The tax sought to be collected from Mesta related only to the machinery, but, like the State here, the county sought to justify it on the ground that it was formally levied on Mesta's realty and was merely measured or enhanced by the Government's personality. Looking at the tax for itself, this Court determined that the substance of the imposition was on the Government's property and and therefore invalid. In this case, too, the tax is collectible from the contractor-bailee, and is

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[3] The circumstances were far different in *Panhandle Oil Co.* v. *Knox*, 277 U.S. 218, and *Graves* v. *Texas Company*, 298 U.S. 393, which were overruled in *Alabama* v. *King & Boozer*, 314 U.S. 1, 9 (see *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U.S. 261, 277). In those cases, the fact that the tax was called a "privilege" tax was unimportant, because the taxpayer-company owned the gasoline which was only *later* sold to the United States. A direct tax on such privately-owned gasoline would today clearly be held valid. Similarly, in *Wilson* v. *Cook*, 327 U.S. 474, upholding a state tax on one who purchased and severed timber on Govern-

formally designated as imposed on a non-immune subject, *i.e.*, the contractor's privilege of doing business. But, as in *Allegheny County*, the realty is that the tax is laid on Government property.

2. Moreover, the Tennessee statute, as well as the tax itself, unconstitutionally discriminates to the disadvantage of the United States and of Esso. In *Tennessee Oil Co.* v. *McCanless*, 178 Tenn. 683, in 1941, the State Supreme Court held this taxing statute inapplicable to a situation hardly distinguishable in pertinent facts from this one—except that the United States was not involved:—The Obion County Board of Education made an arrangement with the oil company by which the latter procured out-of-state gasoline for the Board at cost plus freight, had it shipped to Tennessee, stored it in a tank leased to the Board for one dollar, and then delivered it on order of the Board, at a charge of 2 cents per gallon. The taxing authorities sought to tax the oil company with respect to the gasoline. The Supreme Court held that "the determinative question is:—To whom does the gasoline belong when it comes to rest in the State of Tennessee? *If it belongs to the governmental unit, it is exempt from taxation*" (178 Tenn. at 691, emphasis supplied). Since the Board, an exempt agency, owned the gasoline, the State could not "impose a tax on the gasoline in question" (178 Tenn. at 692).

In its discussion of the *Tennessee Oil* case in the opinion below, the Supreme Court seems to stress the "one-dollar lease" of the tank to the Board as a decisive factor, but in the *Tennessee Oil* case itself it found the "determinative" issue to be the ownership of the gasoline, not of the tank; the lease was considered in the opinion as simply one indication of the ownership of the gasoline (which was not otherwise very clear). To make a heavy tax now turn on the existence *vel non* of a formal one-dollar lease merely emphasizes the inherent discrimination the court reads into the statute.[4]

The *Tennessee Oil* and the instant case, taken together, indicate that where the United States is not concerned the State looks to the ownership of the gasoline to determine taxability, but where the United States is the owner it looks solely to the storer or distributor. No reason for this difference is or can be given, except the desire to

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[4] If the Tennessee taxing authorities, in the period from 1943 to 1946 when the arrangement was operative, had sought to rest the tax on this formal distinction, the United States and Esso would undoubtedly have added a clause to the contracts making such a one-dollar lease. In that respect, the State Supreme Court's opinion errs when it says that "the record does not show that Esso was prejudiced in any way by a failure to collect the tax."

In 1941 and 1943, Tennessee amended its statutes to provide special provisions for the exemption of state governmental units (2 Williams' Tennessee Code, Sec. 1148.22), but the State Supreme Court did not refer to, or rest on, these provisions.

claim a tax which would otherwise be uncollectible. But the unbroken doctrine in this Court is that, whatever a State's taxing laws may do, they cannot discriminate against the United States or against private persons who deal or contract with the United States. Such discrimination is outlawed by the Supremacy Clause and by the constitutional implications of our federal system, as well as by the Equal protection clause of the Fourteenth Amendment. *New York* v. *United States*, 326 U.S. 572, 575-6, 584-5, 586; see *Penn Dairies, Inc.* v. *Milk Contr. Commission*, 318 U.S. 261, 269; *Alabama* v. *King & Boozer*, 314 U.S. 1, 8; *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, 480, 488; *Helvering* v. *Gerhardt*, 304 U.S. 405, 413, 420, 425; *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376, 385, 386; *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 149, 157, 158, 164 (fn. 13), 170-1, 172; *Taber* v. *Indian Territory Co.*, 300 U.S. 1; *Schuykill Trust Co.* v. *Pennsylvania*, 296 U.S. 113, 120; *Indian Territory Oil Co.* v. *Board*, 288 U.S. 325, 327-328; *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, 131; *Pacific Co., Ltd.* v. *Johnson*, 285 U.S. 482, 493-5, 496; *Group No. 1 Oil Corp.* v. *Bass*, 283 U.S. 279, 282; *Alward* v. *Johnson*, 282 U.S. 509, 513-514; *Willcuts* v. *Bunn*, 282 U.S. 216, 225, 226, 229; *Educational Films Corp.* v. *Ward*, 282 U.S. 379, 392; *Macallen Co.* v. *Massachusetts*, 279 U.S. 620, 631-632; *Miller* v. *Milwaukee*, 272

U.S. 713, 715; *Metcalf & Eddy* v. *Mitchell*, 269 U.S. 514, 524.[5]

The Equal Protection Clause is also applicable in this case to bar Tennessee from discriminating against Esso by imposing a tax where the State Supreme Court, by adhering to the rationale of the *Tennessee Oil* case, has indicated that for other companies in similar circumstances the tax, if collectible at all, would be on the owner of the gasoline and not on the storer. See *Hillsborough* v. *Cromwell*, 326 U.S. 620, 623.

3. The issues presented on this appeal are of public importance. A large sum of money, about $4,000,000, ultimately turns on the decision of the Supreme Court of Tennessee. And substantial allegations that a state is taxing Government property or is discriminating against the United States in its tax system always merit review because this Court is the appointed arbiter to settle "the recurring conflicts between the power to tax and the right to be free from taxation which are inevitable where two governments function at the

[5] See also, to the same effect, the dissenting opinions in *Brush* v. *Commissioner*, 300 U.S. 352, 375, 378; *Schuykill Trust Co.* v. *Pennsylvania*, 296 U.S. 113, 120, 123 ff; *Macallen Co.* v. *Massachusetts*, 279 U.S. 620, 638; *National Life Ins. Co.* v. *United States*, 277 U.S. 508, 530-531; *Long* v. *Rockwood*, 277 U.S. 142, 149, 150.

same time and in the same territory." *United States* v. *Allegheny County*, 322 U.S. 174, 175, 176.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

OCTOBER 1952.

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No. 378

In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES CLARENCE EVANS, COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE, JOHN F. KISER, HIS SUCCESSOR IN OFFICE, AND J. M. DICKINSON, PRESENT COMMISSIONER OF FINANCE AND TAXATION

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

BRIEF FOR THE UNITED STATES

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Chancery Court, Part I, of Davidson County, Tennessee (R. 314–319) is unreported. The original opinion of the Supreme Court of Tennessee (R. 6–12) is reported at 250 S. W. 2d 569. The opinion on the petition to rehear (R. 24–25) has not been reported.

JURISDICTION

The judgment of the Supreme Court of Tennessee was entered on June 7, 1952 (R. 13). A petition to rehear, seasonably filed by appellant Esso Standard Oil Company on June 16, 1952 (R. 14), was entertained and denied with an opinion (R. 24–26) on July 11, 1952. The petition for allowance of an appeal was filed October 2, 1952 (R. 321), and was allowed on the same date (R. 322). This Court, by order of November 10, 1952 (R. 327), noted probable jurisdiction.[1] The jurisdiction of this Court to review the decision by appeal is conferred by 28 U. S. C., Sections 1257 (2) and 2101 (b).

QUESTIONS PRESENTED

1. Whether the Tennessee gasoline tax of seven cents per gallon, assessed against and collected from a Government contractor storing aviation gasoline for the United States, is valid under the Constitution of the United States to the extent assessed with respect to gasoline owned by the United States.

2. Whether the Tennessee gasoline tax statute unconstitutionally discriminates against the United States in that, as construed by the State Supreme Court, it imposes a tax with respect to

[1] The Court also noted probable jurisdiction in the companion case (*Esso Standard Oil Co.* v. *Evans*, No. 330) at the same time.

gasoline owned by the United States in circumstances where the same tax would not be levied if the gasoline were owned by others.

STATUTES INVOLVED

The applicable portions of the Tennessee statutes involved are set forth in the Appendix, *infra*, pp. 54 *et seq.*

STATEMENT

This is a suit by Esso Standard Oil Company,[2] a contractor with the Government, to recover from the Tennessee Commissioner of Finance and Taxation certain gasoline taxes assessed and collected from it by the State of Tennessee with respect to Government-owned gasoline stored by Esso for the United States. The arrangement between Esso and the United States lasted from 1943 to 1948, but the statute of limitations bars collection of the tax for 1943. The instant suit, involving only the month of January 1944, is a test case. If the ruling of the state courts is applied to the remainder of the period, the amount collected by the State will amount to upwards of $3,800,000 (as calculated by the State); including the judgment below, the amount is over $4,000,000. The United States, which has agreed to reimburse Esso for taxes incident to its contract (Compl. Ex. I, R. 345–349),

[2] The Standard Oil Company of Louisiana was merged into Esso Standard Oil Company, which was formerly the Standard Oil Company of New Jersey. We shall refer to the company merely as Esso.

intervened in the trial court (R. 45–6) in support of Esso and has since participated in the case. Both the trial court and the State Supreme Court held against Esso and the United States on the taxes involved in this appeal.

1. As found by the trial court (R. 314–319) and set forth in the record, the pertinent facts may be summarized as follows:

During the time involved in this suit (January 1944), Esso was engaged in performing contracts with the War Department, entered into pursuant to the First War Powers Act of 1941 (Act of December 18, 1941, c. 593, 55 Stat. 838, Sec. 201) and Executive Order No. 9001 (December 27, 1951), providing for the storage and handling, in its own and leased facilities at Memphis, of Government-owned aviation gasoline which was brought to Tennessee from outside the State (R. 314, 329 *et seq.*). At the direction of the Army Air Forces, Esso delivered the gasoline to an Air Force base in Tennessee, or delivered it to carriers employed or owned by the United States for transportation to bases or points within or without Tennessee (R. 144–145). For its services, depending on their scope, Esso received amounts ranging from 0.18 cent to over 6 cents per gallon (R. 314); the bulk of the payments during January 1944 were at a fraction of a cent per gallon, and over the six months period from January to June 1944 were at the 0.18 cent rate (R. 441–442).

In greater detail, the course of operations was as follows: Aviation gasoline was produced in other states by several refineries, Esso being only one of them (R. 79). Upon production, it became the property of Defense Supplies Corporation (DSC) (R. 55–8), a World War II subsidiary of Reconstruction Finance Corporation, and came for allocation purposes under the jurisdiction of the Petroleum Administration for War (PAW) (R. 53–54, 59–60, 66, 79, 114–5). The gasoline involved here was allocated by PAW to the Army Air Forces for use at air bases and airfields in the South (R. 75).

Upon presentation of the proper allocation certificates to its agents, DSC delivered (and passed title to) the gasoline to an authorized property officer of the Army Air Forces, either at a refinery in Louisiana or Oklahoma or at the pipeline in East St. Louis, Illinois (R. 118, 120–1, 124, 195). The Air Forces then arranged for transportation by barge to Memphis (R. 114–5, 139). This transportation generally was by outside carrier on a Government bill-of-lading, but not infrequently was by Government barge towed by contract tugs (R. 114, 117–127). The trial court found that "in the true sense, Standard Oil Company [Esso] was neither consignee nor consignor, but that the substance of the transaction was that the Government itself was the consignee of each of these shipments * * *" (R. 317).

Upon arrival in Memphis, the gasoline was pumped by Esso into its tanks, including tanks leased for the purpose from the Lion Oil Refining Company (R. 129, 141, 152, 401). Commingling with Esso's own gasoline occurred only in minor quantities and then only in grade 91 octane (R. 149–50). At that time, all supplies of the other grade—100 octane—were wholly owned by the Government (R. 58), and the 100-octane grade constituted the bulk of the gasoline in controversy.

After storage, Esso delivered the gas only upon written direction by supply officers of the Air Forces (R. 144). Except for the relatively small gallonage delivered to the Memphis Air Base, the gasoline was placed by Esso for delivery in tank trucks owned by the Government, or in similar trucks of carriers under contract with the Air Forces (R. 144–45, 314). A very substantial part of the gasoline was transported to air bases outside of Tennessee, in Mississippi, Arkansas, etc. (R. 172–73).

2. Among other things, the various Tennessee gasoline tax statutes impose a "special privilege tax" on all "distributors" of gasoline in the State "for engaging in and carrying on such business in this state" "in an amount equal to [seven] cents for each gallon of gasoline * * * refined, manufactured, produced, or compounded by such distributor and sold, stored or distributed by him in this state, or shipped, transported or imported by

such distributor into, and distributed, stored or sold by him within this state * * **". *Infra*, pp. 55–56.[3]

Although they had full knowledge of all the facts, and Esso presented the required reports, the Tennessee revenue officials did not seek to assess, collect or demand this tax from Esso until August 1949, three years after the completion of full performance of Esso's contracts with the United States (R. 285, 307–9, 315, Compl. Ex. 46, R. 455–6, Def. Ex. 5, R. 497–9). During the contracts' performance, both Esso and the United States were led to believe that no tax was due (R. 189). Relying upon this administrative construction, the United States and Esso continued their arrangement through 1944 and in subsequent years (R. 189–90).

As noted above, demand was first made in August 1949 (R. 315). Esso paid under protest the amount demanded for the month of January 1944 (R. 7, 314), and then brought this suit to recover, contending that the statute did not impose the tax and also that, if it did, the State gasoline tax and the assessment of the tax were illegal and void under the Federal Constitution because in conflict with the immunity of the United States from state taxation. In its bill of complaint Esso alleged that "the Tennessee gaso-

[3] The case below also involved certain inspection fees, penalties and interest (R. 8, 10–11, 315–317, 318–319) which are not here in issue.

line tax law," if construed to cover this case, is invalid and void because it "is repugnant to the Constitution of the United States" (par. XX, R. 34–5), that the assessment of the tax "is illegal and void for the reason that such assessment is upon the exclusive property or instrumentality of the United States which is immune from taxation by the State of Tennessee under the Constitution of the United States" (par. XXI, R. 35), that the assessment "imposes a tax on property which is an instrumentality of the United States and constitutes an unconditional imposition upon the United States" (par. XXII, R. 35), and that the Commissioner of Finance and Taxation "has applied these provisions of the Tennessee gasoline tax law in a manner which renders that law invalid under the Constitution of the United States" (par. XXIII, R. 35). In intervening, the United States adopted these allegations (R. 46).

The Chancery Court ruled against these contentions as far as the so-called privilege tax was concerned ($196,848.68), but did disallow inspection fees, penalties and interest (R. 314–319). The federal constitutional question was preserved on appeal to the Supreme Court of Tennessee by assignments of errors filed by Esso and adopted by the United States (see Statement as to Jurisdiction in No. 330, pp. 38–39). The State Supreme Court ruled adversely to these contentions (R. 6–12).

The contention that the statute, as applied, unconstitutionally discriminates against Esso in violation of the Equal Protection Clause of the Fourteenth Amendment, was first specifically mentioned in Esso's petition to rehear in the Supreme Court of Tennessee. This contention, as well as the contention that there is an unconstitutional discrimination against the United States, were seasonably raised for the reasons discussed *infra*, pp. 51–53.

SPECIFICATION OF ERRORS TO BE URGED

The assignment of errors filed by the United States is set out in the record, at pp. 323–324. They are as follows:—

The Supreme Court of Tennessee erred:

1. In failing to hold that the Tennessee gasoline tax law (Secs. 1126, et seq. of the Code of Tennessee (1932), as amended), as construed and applied here to require the inclusion in the measure of the gasoline tax payable by Esso Standard Oil Company of gasoline owned by the United States, violates the Constitution of the United States and is void as in effect imposing a tax on property and an instrumentality of the Federal Government.

2. In failing to hold that the Tennessee gasoline tax, as assessed here, is illegal and void under the Constitution of the United States as a tax on

property and an instrumentality of the Federal Government.

3. In holding that, as applied here, the Tennessee gasoline tax law imposes a privilege tax on the business of storing gasoline and not a tax on Federally-owned gasoline, and that the tax assessed here was a privilege tax on Esso Standard Oil Company's business of storing gasoline and not a tax on Federally-owned gasoline.

4. In failing to hold that the Tennessee gasoline tax law, as construed and applied here, invalidly discriminates against the United States and Esso Standard Oil Company, contrary to the Equal Protection Clause of the Fourteenth Amendment, the Supremacy Clause, and the implied constitutional immunity of the Federal Government and those who deal with it from discrimination by the States, in that said law imposes a tax here, with respect to Federally owned gasoline, in circumstances in which the same tax would not be imposed if the gasoline were owned by a private person other than the distributor or storer.

5. In failing to hold that the Tennessee gasoline tax, as assessed here, invalidly discriminates against the United States and Esso Standard Oil Company on the grounds stated in the preceding assignment of error.

6. In affirming the judgment of the Chancery Court insofar as it gave judgment against Esso Standard Oil Company and the United States.

The United States also adopts as its own the assignment of errors heretofore filed by Esso Standard Oil Company.[4]

SUMMARY OF ARGUMENT

Tennessee has recently imposed a tax of 7 cents a gallon with respect to Government-owned gasoline for the storing of which, in 1944, Esso ordinarily received only a fraction of a cent a gallon. The tax is sought to be supported as merely a privilege tax on Esso's business as a bailee of gasoline, but it actually and in full effect amounts to an unconstitutional imposition upon the Government-owned gasoline, or upon the Government itself as user of the gasoline. Moreover, Tennessee's taxing statute, as construed by its highest court, discriminates against the United States and Esso by taxing in circumstances where the same tax would not be levied if the gasoline were owned by another than the United States.

I

A. Though the State legislature and the State Supreme Court, in the opinion below, have characterized the tax as laid upon the "privilege" of "engaging in the business of storing gasoline" (R. 8), this Court is free, in deciding an issue of constitutional immunity, to disregard this label and to determine for itself the true nature, opera-

[4] Esso's assignment of errors is set out at R. 4-5.

tion, and effect of the tax as applied and enforced in this case. The characterization of the tax for state purposes does not rule the federal question. See, *e. g., United States* v. *Allegheny County,* 322 U. S. 174, 184; *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals,* 338 U. S. 665, 674. And a survey of Tennessee's gasoline tax laws shows that in this instance the tax was not actually levied on Esso for the privilege of storing the Government's gasoline, but rather on the federal property itself or on the Government as the user of the gasoline—with advance collection of the tax from Esso.

The Tennessee statutes were developed between 1923 and 1944 to set up a system designed to tax all gasoline used in vehicles in the State at the rate of 7 cents a gallon, with certain exceptions, and to tax each gallon only once, collecting the tax as soon as possible after manufacture or importation into the State. If the gasoline is manufactured and sold in Tennessee, the manufacturer pays the tax, and no other tax is paid. If it is imported and stored, the first storer pays the tax, and neither a succeeding storer or distributor nor the consumer need pay it. If the tax is not paid by the manufacturer or one or another storer or distributor, it must be paid by the ultimate consumer. The statutes contemplate that a storer or distributor or dealer or consumer need pay the tax only with respect to gasoline not previously identified as a measure of tax

liability. Indeed, in 1947, the legislature explicitly declared, without changing the provisions of the gasoline tax statutes or the method of collection, that the tax was a levy on the consumer. This specific declaration merely put formally into the statute what had long been the reality, *i. e.*, that the tax is a levy on the ultimate user or on the gasoline.

Conversely, the tax is not really laid on the privilege of storage or distribution—as is shown by the exclusion of all gasoline previously subject to the tax so that only the first storer need pay the tax, by the provisions taking account of spillage and evaporation during storage, and by the complete disregard of length of storage, as well as by the statutory exemptions from the tax. Refunds are made to consumers for all gasoline used for industrial (i. e., non-vehicular) or agricultural purposes; gasoline destined for export has been completely excluded for some time; and aviation gasoline was recently exempted. If the tax were actually imposed on the privilege of storing, these exceptions would clearly serve no relevant purpose and would not have been made.

Furthermore, the tax of seven cents per gallon is much too large to be considered an impost on the business of storing, especially since it takes no account of the storer's costs or revenues or the duration of the storage. Normally, a jobber's spread between his cost and his selling price is far less than seven cents per gallon, and the tax

would more than eat up his entire margin. In this particular case, the difficulty of viewing the tax as one on storage is highlighted by the fact that the seven-cent levy is said to tax a storage business for which Esso mostly received a fraction of a cent per gallon.

In short, the Tennessee gasoline tax applied here is not a tax on the privilege of storage, but either a tax on the gasoline itself or on its owner-consumer. In previous cases, the State Supreme Court has sometimes indicated as much. *Tennessee Oil Co.* v. *McCanless*, 178 Tenn. 683; *Texas Co.* v. *McCanless*, 177 Tenn. 238. If there be any doubt, it is fair to hold the State to this view, since it deliberately refrained from assessing the tax during the period of Esso's arrangement with the United States, when other plans could have been made if the tax were levied, or an attempt could have been made to obtain immunizing legislation.

B. It is no longer open to debate that a tax on Government property or on the Government itself violates the Federal Constitution. See, *e. g.*, *Mayo* v. *United States*, 319 U. S. 441; *United States* v. *Allegheny County*, 322 U. S. 174. The fact that the tax is collected from Esso, a bailee which had temporary possession of the Government's property, rather than from the United States; does not destroy the immunity, as the *Allegheny County* and a host of earlier decisions prove.

C. The rulings on which Tennessee relies (*e. g., James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Alabama* v. *King & Boozer*, 314 U. S. 1; *Curry* v. *United States*, 314 U. S. 14) do not support the decision below. In all of those cases, the exaction was found to be actually levied on the contractor, or his "own property, profits, or purchases" (322 U. S. at 186), and was sustained for that reason alone. Here, as in the *Allegheny County* case, we have the contrary situation—a statutory scheme which makes Esso a conduit for taxing the Government's use of gasoline or the gasoline itself.

II

Even if the tax would not be invalid if fairly laid on others in similar circumstances, it is illegal here since the State Supreme Court has unconstitutionally discriminated to the disadvantage of the United States and Esso by looking to the ownership of the gasoline to determine taxability in comparable cases where the United States is not concerned (*Tennessee Oil Co.* v. *McCanless*, 178 Tenn. 683), but looking solely to the storer or distributor in this case where the United States is the owner. No reason for this difference can be given except the desire to claim a tax which would otherwise be uncollectible. It is fundamental in our federal system that a state's taxing laws may not discriminate against the United States or its contractors. *E. g., New York* v. *United States*, 326 U. S. 572, 575–6, 584–5; *Miller* v. *Milwaukee*, 272 U. S. 713.

ARGUMENT

I

THE TENNESSEE GASOLINE TAX, ASSESSED AND COLLECTED FROM A GOVERNMENT CONTRACTOR STORING GASOLINE FOR THE UNITED STATES, IS INVALID UNDER THE FEDERAL CONSTITUTION TO THE EXTENT ASSESSED WITH RESPECT TO GASOLINE OWNED BY THE UNITED STATES

Tennessee has imposed a tax of 7 cents a gallon with respect to Government-owned gasoline for the storing of which Esso ordinarily received only a fraction of a cent per gallon. That the gasoline was at all times Government-owned is not disputed, and was expressly found by the trial court. (R. 314, 317.) The United States was the consignee of the shipments by which the gasoline came into Tennessee for storage (R. 317), and it was the consignee of the shipments by which the gasoline was distributed to various Air Force bases (R. 6–7, 314). What Esso did was simply to store the Government gasoline and then to arrange for its delivery in response to requisitions by Air Force supply officers. *Supra*, pp. 4–6. Esso's charges varied from .18 cents to slightly over 6 cents per gallon, depending upon the extent of Esso's services,[5] but during January 1944 all

[5] The higher charges were for delivery by Esso's own trucks, and the lower charges were for delivery by Government conveyance or commercial carrier (R. 18, 350–358, 362–366).

but a small amount was charged at a fraction of a cent (R. 441–443). The bulk of the payments were at the two lowest rates of .3 and .18 cents (R. 441–442). See Esso's Brief in No. 330, at pp. 15–16.

A further fact requires brief notice. By force of provisions in the contracts, the Government was required to reimburse Esso for "all applicable and valid state or local taxes, fees, and charges". *Supra*, p. 3. If the tax here involved is valid, it will be the Government, not Esso, which is out of pocket. This fact was important in supporting the right of the United States to intervene in the state court (R. 45–46). But our position is, of course, that the immunity of the Government's property from state taxation does not rest on the contractual obligation of reimbursement. The immunity arises because, though the tax is sought to be supported as a privilege tax on Esso's business as a bailee of gasoline, in this case it actually and in full effect amounts to an imposition upon the Government itself or upon the Government's property.

A. THE TAX IS EITHER UPON THE GOVERNMENT OR UPON THE GOVERNMENT'S GASOLINE

1. The tax was assessed under the purported authority of Sections 1126 *et seq.* of the Tennessee Code (Appendix, *infra*, pp. 54 *ff*). Section 1127 imposes "a special privilege tax" on "distributors" for "engaging in and carrying on such

business". Section 1126 defines a distributor as including—

> every person who engages in the business in the state of refining, manufacturing, producing, or compounding gasoline * * *, and selling or storing the same in this state; and also every person who engages in the business in this state of transporting, importing, or causing to be imported, gasoline * * * in this state, and distributing, storing, or making original sales of the same in this state, for any purpose whatsoever.

Section 1128 imposes a similar tax on a "dealer", "provided that gasoline or distillate previously identified as a measure of tax liability of a registered distributor shall not be included in the measure of such dealer's tax liability". And "dealer" is defined broadly in Section 1126 to cover all others than "distributors", including ultimate users or consumers (*infra*, pp. 54–55).

The State Supreme Court characterized this tax as on the "privilege" of "engaging in the business of storing gasoline based on the number of gallons in storage" (R. 8–9), and the statute refers to the levy as a "special privilege tax" (Sections 1127 and 1128, *infra*, pp. 55, 56). But this Court, in passing upon questions under the Federal Constitution, is entirely free to disregard such designations and characterizations, and to decide for itself the real incidence, nature, operation and

impact of the tax. *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, 338 U. S. 665, 674; *United States* v. *Allegheny County*, 332 U. S. 174, 184; *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69, 84; *Wisconsin* v. *J. S. Penney Co.*, 311 U. S. 435, 443; *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 476; *Carpenter* v. *Shaw*, 280 U. S. 363, 367–368; *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 625, 626.[6] The Court's inquiry, as these cases show, goes to substance rather than form, to practical operation and effect rather than nomenclature, to realities and not to labels. "The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents * * *". *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, 292.[7] Cf. for similar statements, *Madison Suburban Utility Dist.* v. *Carson*, 191 Tenn. 300, 307–308; *Howard* v. *Commissioners*

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[6] See also, to the same effect, *Schuykill Trust Co.* v. *Pennsylvania*, 296 U. S. 113, 119; *Senior* v. *Braden*, 295 U. S. 422, 429; *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276, 280; *Storaasli* v. *Minnesota*, 283 U. S. 57, 62; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 387–388; *Hanover Ins. Co.* v. *Harding*, 272 U. S. 494, 509–510; *Shaffer* v. *Carter*, 252 U. S. 37, 55; *Kansas City Ry.* v. *Kansas*, 240 U. S. 227, 231; *St. Louis, S. W. Ry.* v. *Arkansas*, 235 U. S. 350, 362–363; *Choctaw & Gulf R. R.* v. *Harrison*, 235 U. S. 292, 298; *Galveston, Harrisburg & San Antonio Ry.* v. *Texas*, 210 U. S. 217, 227.

[7] In the *Dawson* case, the Court indicated that a decision by the highest court of the state on the true character of the tax would be conclusive (255 U. S. at 292), but that was because it was measuring the tax against a provision of the state constitution.

of the Sinking Fund of the City of Louisville, this Term, No. 295, decided February 9, 1953, slip op., p. 5.

2. In determining the true character of the particular Tennessee gasoline tax which was applied and enforced in this case, the greatest sources of light are the history of the tax and the comprehensive system of gasoline taxation of which it forms an integral part. "A taxing statute, like others, must be read as a whole, as it stands on the statute books at its applicable date, and the legislative purpose in enacting it must be taken, regardless of forms of words, to envisage the obvious consequences which flow from its operation." *Pacific Co,* v. *Johnson,* 285 U. S. 480, 495. See also *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472, 479–480; *Henneford* v. *Silas Mason Co.,* 300 U. S. 577, 583–585; *Douglas Aircraft Co.* v. *Johnson,* 13 Cal. 2d 545; *cf. New Orleans* v. *Houston,* 119 U. S. 265, 278; *Home Insurance Co.* v. *New York,* 134 U. S. 594.[8]

Realistically viewed as a whole in the light of the consistent line of their development, the composite group of Tennessee gasoline tax laws operates collectively as a tax on each gallon of gasoline

[8] The Tennessee legislature often speaks of the gasoline tax statutes collectively. See Chapter 117 of the Public Acts of Tennessee of 1941 which refers to the State Gasoline Tax in capital letters, and Chapter 15, Section 1, of the Public Acts of 1945, which states that if a person stores, unloads or sells any fluid without having it inspected, the fluid "shall be subject *to the gasoline tax.*" [Italics supplied.]

or as an excise on the consumer's use of each gallon of gasoline, but with advance collection from the large refiner or distributor whenever administratively convenient and feasible. As applied here, the state's gasoline tax represented either a tax on federally-owned gasoline or a tax on the United States for using and consuming gasoline. This is shown by a survey of the development of the Tennessee gasoline tax system which reveals that the tax imposed on Esso, though called "a special privilege tax" for storage, is in practical operation and effect a tax on the gasoline or on its use by the gasoline's owner.

The Tennessee gasoline tax levied by Chapter 58 of the Public Acts of 1923 applied to sales and placed no tax on storage. However, the Public Acts of 1925, Chapter 68, extended the scope of the Act of 1923 to include not only those engaged in selling gasoline, but also those engaged in storing it and then withdrawing it for sale or other use. The Supreme Court of Tennessee explained the purpose of the 1925 Act, in *Foster & Creighton Co.* v. *Graham*, 154 Tenn. 412, 419–420, by saying—

> We think the effect of the amendatory act of 1925, when properly interpreted, is to reach gasoline that is stored and thereafter withdrawn and used without being sold by any person, etc.

Under the act of 1923, a large consumer of gasoline, desiring to escape the tax

levied by the act, could do so by buying his gasoline in quantities, say in tank lots, storing it, thereafter withdrawing it, and using it as needed. In such case there would be no intrastate sale or distribution within the meaning of said act, and such consumer would not, therefore, be subject to the tax.

It was manifestly the purpose of the legislature in passing the amendatory act to cut off this avenue through which *large consumers* might evade the tax.

We think the act, when properly interpreted, not only applies to distributors and dealers in gasoline, but *applies to consumers who purchase gasoline in interstate commerce and store it, and thereafter distribute the same, or allow the same to be withdrawn from storage, whether such withdrawal be for sale or other use.* * * * [Italics supplied.]

The gasoline tax was incorporated into the revised Tennessee Code in 1932, beginning with Section 1126 of the Code, but by Chapter 130 of the Public Acts of 1933, the legislature amended the various sections "so as to provide that the gasoline tax * * * should be paid by dealers and distributors according to the amount held in storage in the state, instead of according to the number of gallons withdrawn from storage, as provided by the Code." *Texas Co.* v. *Fort*, 168 Tenn. 679, 681. In the *Texas Co.* case (p. 686), as in earlier decisions (*Foster & Creighton*

Co. v. *Graham,* 154 Tenn. 412, and *Quick Service Tire Co.* v. *Smith,* 156 Tenn. 96, 102), the State Supreme Court characterized the gasoline tax as imposed on the "privilege" of engaging in the business of storing, but it is noteworthy that in each case the gasoline was being stored by, and taxed to, its owner, and the Supreme Court recognized in its *Foster & Creighton Co.* opinion that the legislature was attempting to prevent avoidance of the tax by *large users and consumers* (see *supra,* pp. 21–22).[9]

Significantly, Chapter 202 of the Public Acts of 1937 changed the definition of a "dealer" in Section 1126 of the Tennessee Code to include "every person who uses or consumes gasoline * * * *when such gasoline has not previously been the measure of a privilege tax under this statute*" (*infra,* pp. 54–55 [Italics supplied]), and imposed the gasoline tax under Section 1128 of the Code on "dealers" as so defined. This was subject to the proviso that gasoline already "identified as a

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[9] In *Tennessee Oil Co.* v. *McCanless,* 178 Tenn. 683, 691, 692 (1941), the State Supreme Court referred to the tax as if it were imposed on the gasoline. See *infra,* pp. 29, 46–47.

In *Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U. S. 249, 265, involving the owner of the gasoline sought to be taxed, this Court followed the state court in declaring that "storage of the gasoline and withdrawal of it from storage within the state for use or sale" are the events calling the statute into operation. But the Court also pointed out (pp. 267–268) that the state could tax the railroad's property and was here merely taxing a "right or power incident to appellant's *ownership of the gasoline.*" [Italics supplied.]

measure of tax liability of a registered distributor shall not be included in the measure of said dealer's tax liability" (*infra*, p. 56). Obviously this tax upon "dealers"—artificially and all-inclusively defined—amounts to an excise on the use of gasoline by the ultimate consumer, but with an exception if there has been advance collection from any other "dealer" or "distributor". So, too, in the case of those other than the final consumer, if the tax has already been paid, there is no subsequent levy.

As now constituted (and as it was in 1944), it is clear that the Tennessee gasoline tax is not a tax upon the business or occupation of storing or distributing gasoline. The dominating thrust of the statute is that a tax must be paid for each gallon of gasoline, but it need be paid only once, and if the tax has not been paid by the time the gasoline reaches the ultimate consumer, he is liable for it—in his statutory guise of "dealer". As for storage, there is no real attempt to tax that "occupation" or "privilege". A particular lot of gasoline may pass through a dozen storage depots or tank farms without one of them being obliged to pay the tax. The only storer required to do so is the one who first stores gasoline *on which no tax has previously been paid.* Or, if the tax is paid for the manufacturing of gasoline in the State, then no one pays a tax for the privilege of storing. The designation of the tax as on "storage" is no more

than a partial and incomplete device to assure the payment of the seven cents tax for each gallon. Where that payment is otherwise assured, the "privilege of storing" is wholly forgotten.

That the tax is in reality not a tax on storage is further demonstrated by Chapter 288 of the Public Acts of 1937, which provided:

> SECTION 1. * * *
>
> 1128)1 The tax on all gasoline, other than on gasoline as defined in Section 1126, subsection (a) of the fifth paragraph [10] shall be *refunded when used for industrial purposes* and not used in internal combustion engines, subject to such general limitations and regulations as the Commissioner may prescribe. * * * [Italics supplied.]

If the impost were truly a tax on the privilege of storing, the legislature would not provide for a refund to be made to users, even a limited category, based on how the fuel is used. An ultimate consumer's disposition of fuel has no normal relationship to a fuel storage business operated by some third party at a distribution stage prior to

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[10] The fifth paragraph of Section 1126 reads:

"The term 'gasoline' means and includes (a) the volatile substance produced from petroleum, natural gas, oil shales, or coal heretofore sold under the name of gasoline, (b) any volatile substance or product less than 112 Fahrenheit flash test when tested in a manner approved by United States bureau of mines derived wholly or in part from petroleum, natural gas, oil shales, or coal, and (c) benzol and/or any other volatile substance used wholly or in combination with gasoline as a liquid fuel."

consumption. This exception for use "for industrial purposes and [when] not used in internal combustion engines" unmistakably indicates the overriding legislative purpose to tax each gallon used to propel vehicles.

The export exemption furnishes another proof that the tax has no real relation to storage but amounts either to a tax on each gallon or on the user. In 1943, the legislature passed Chapter 50 of the Public Acts of 1943,[11] which provided in Section 4 (*infra*, p. 68) that—

> all gasoline or other volatile substances as described in this Act *which are exported* to points outside the State, shall only be liable for the inspection fee of one-twentieth of one cent per gallon as levied in Section 1 of this Act, and *there shall be no liability for gasoline taxes levied under the Code of Tennessee, Sections 1126–1148.3 inclusive,* * * * [Italics supplied.]

This exception also strongly suggests an intention not to tax the privilege of storing gasoline, since the legislature here exempts from all tax a sizeable amount of gasoline stored in Tennessee, undoubtedly to aid the state's gasoline storage and export business. Otherwise, gasoline tem-

[11] Section 3 of this Act (*infra*, p. 68) lifted the requirements, previously imposed by Section 1140 of the Tennessee Code (*infra*, pp. 62–63), that gasoline must be stored in separate export tanks and actually exported within 60 days to be excluded from the gasoline tax. Note that, from 1923, there has never been a storage tax, as such, on export gasoline.

porarily stored in Tennessee and later sold in another state would have been subject to two state gasoline taxes and consequently be effectively priced out of the market in the second state.

Section 1130 of the Tennessee Code (*infra*, p. 58) provides for an allowance to the distributor covering loss of gallonage resulting from evaporation, handling, and unloading. The allowance is provided as a deduction, so that only the gasoline which leaves the distributor's tanks is actually taxed. The number of gallons put into storage is only used incidentally as a starting point in the tax calculation. This provision, too, is evidence that the legislature is concerned not with storage but with the number of gallons of gasoline leaving the hands of the distributor and flowing into the channels of distribution to the ultimate consumer for use in internal combustion engines.

The same dominating motives run through later enactments. In 1947, the legislature provided by Chapter 21 of the Public Acts of 1947 for the refund of gasoline taxes, less one cent, to anyone who uses tax-paid gasoline for agricultural purposes, and two years later, by Chapter 34 of the Public Acts of 1949, it exempted aviation gasoline from the gasoline tax completely. These amendments furnish further evidence of a continuing lack of purpose to tax the business of storing gasoline.

Then, by Chapter 168, Public Acts of 1947, the state's lawmakers declared:

> AN ACT To declare the liability for or incidence of certain taxes levied by the State of Tennessee
>
> SECTION 1. * * * *That the liability for, or the incidence of, the gasoline tax is hereby declared to be a levy on the consumer.* The distributors shall add the amount of gasoline taxes presently levied to the price of such gasoline and the distributor may state the amount of the taxes separately from the price of such gasoline on all price display signs, sales or delivery slips, bill and statements which advertise or indicate the price of such gasoline. The provisions of this Section shall in *no way affect the method of collection of said gasoline taxes as provided by existing law.* [Italics supplied]

This statute, explicitly declaring that the tax is levied on the *consumer*, did nothing to change the existing sections of the Tennessee Code or other statutory law, nor the methods of collection. It merely put specifically into the gasoline tax law what had long been implicit—that the tax is not in reality on storage but is a levy on the gasoline itself or on the user of the gasoline, with a complex system of advance collection for the administrative convenience of securing payment as early and easily and in as large amounts as possible.[12]

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[12] Prior to 1944 (the year involved here), the Bureau of Internal Revenue had ruled that for federal income tax

The legislature was only formally recognizing in 1947, what the State Supreme Court had held in 1941, when instead of the "privilege of storing", it spoke of the gasoline itself as tax-free or not tax-free, and as exempt or not exempt from the tax, and held that the state could not "impose a *tax on the gasoline* in question" (*Tennessee Oil Co.* v. *McCanless*, 178 Tenn. 683, 690, 691, 692, italics supplied) (see *infra*, pp. 45–49).[13]

On this view, the tax here was, despite the formal words of the statute, actually levied either on the Government-owned gasoline or on the Government as user and consumer, and not at all on Esso's "privilege of storage".[14]

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purposes the Tennessee gasoline tax is levied on the consumer, and is therefore deductible by the consumer under the general tax deduction provisions of Section 23 (c) (1) of the Internal Revenue Code, relating to deduction of taxes. See I. T. 3616, 1943 Cum. Bull. 136.

[13] And in *Texas Co.* v. *McCanless*, 177 Tenn. 238, the Supreme Court held that the gasoline tax involved here is *in pari materia* with the inspection tax which it held, in the opinion below (R. 8), to be an *excise on the gasoline*, and therefore invalid as assessed with respect to federal property (*supra*, p. 7, fn. 3, italics supplied).

[14] In the state courts, Esso argued that under the literal terms of the statute, no tax could be assessed against it under the type of contract involved here. Its contentions were that (a) it was not liable as a "distributor" (under Section 1127) because though it was a storer it neither manufactured, produced, or compounded this gasoline within the state, nor did it ship, transport, or import the gasoline into the state (see R. 14–16), and (b) it was not liable as a "dealer" (under Section 1128) because it did not come within the statutory definition of "dealer". Esso's conclusion was that,

3. Another important reason for casting aside the State's characterization of the levy as laid on the right of storage is the amount of the tax. It is difficult to reconcile a tax of seven cents a gallon with the claim that it constitutes a tax on the privilege of engaging in the business of storing that gasoline. The rate is far out of proportion to the fraction of a cent per gallon normally charged the United States by Esso. Yet there is no claim that the transaction between the Government and Esso was not a bona fide one entered into at arm's length and in good faith. Indeed, the State Supreme Court speaks of the charge as a "very substantial and lucrative business" for Esso (R. 9). Of course, this would not be the case were it not for the United States' agreement to assume the burden of any taxes levied.[15] We think immaterial, however, the contractual right of reimbursement Esso has from the Government under the contracts. The operation and effect of the gasoline tax should be adjudged

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if it had made a similar arrangement with a private owner, it would not be subject to the tax, but the gasoline would not have escaped taxation because the private owner would have been liable, under Sections 1126 and 1128, as a "dealer". Though these contentions have support in the statutory language and the admitted facts of this case, they were summarily rejected, without much explanation, by the courts below (see R. 9, 24–25, 317).

[15] Esso's gross receipts from the United States, under its contracts, amounted to less than $13,000 for the month of January 1944 (R. 441–443), while the gasoline tax for that period amounts to almost $196,850 (R. 319).

without reference to these contracts. Certainly the assessment of a state tax otherwise invalid cannot be rendered valid and constitutional by a contractual agreement to reimburse the contractor against whom it is assessed, no more than the fact that an otherwise valid state tax upon a government contractor is rendered invalid by the Government's contract and obligation to reimburse him. *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 160; *Alabama* v. *King & Boozer*, 314 U. S. 1, 14; *Curry* v. *United States*, 314 U. S. 14, 18.

That the description of the tax as a "privilege tax on engaging in the business of storing gasoline" (R. 8) is a misnomer can be readily seen from relevant petroleum industry figures of gasoline prices for the month of January 1944. These figures (taken from the Gasoline Index of the National Petroleum News) are as follows: [16]

[Cents per gallon]

	Tank car [1]	Dealer tank wagon [2]	Spread
January 3, 1944	6.64	10.43	3.79
January 10, 1944	6.66	10.43	3.77
January 17, 1944	6.66	10.43	3.77
January 24, 1944	6.66	10.43	3.77
January 31, 1944	6.66	10.43	3.77

[1] The tank car index is the weighted average of the following wholesale markets for regular grade gasoline, f. o. b. refineries or terminals: Oklahoma, Mid-Western, Western Pennsylvania, California, New York Harbor, Philadelphia, Jacksonville, Boston, and Gulf Coast.

[2] The dealer index is an average of "undivided" dealer prices, ex-tax, in 50 cities.

[16] These figures are compiled from the National Petroleum News of January 5, p. 44; January 12, p. 44; January 19, p. 47; January 26, p. 47; and February 2, 1944, p. 43.

The last column represents the difference between what an independent jobber paid for gasoline, f. o. b. refinery or terminal, and the price he could obtain from a filling station operator. It is the margin which covers transportation costs to the jobber's tank farm and thence to the filling station, tank-farm storage costs, handling costs, and profit.

The relevance of these figures to this case lies in the fact that Esso's contractual obligations were somewhat similar to the functions performed by the independent jobber, except for the Government's bearing the cost of transportation to Esso's tanks. Aviation gasoline is normally handled in much the same manner as automobile gasoline and with the same equipment and personnel.[17] The costs of handling and storing the two fuels are comparable. Assuming a spread of as high as five cents per gallon on aviation fuel, it is apparent that a tax of seven cents per gallon is far too high to be considered a tax on the business of storing or handling either motor or aviation gasoline;

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[17] *Aviation Fuels and Their Effects on Engine Performance*, p. 9 (1951), prepared by the Ethyl Corporation states that "aviation gasolines are no more dangerous than motor gasolines which have about the same vapor pressure". Interstate Commerce Commissioner Regulations make no distinction in the handling of the two types of fuel. 49 C. F. R. 119 (1950 Revision of 1949 Edition). The Standards of the National Board of Fire Underwriters for the Storage, Handling and Use of Flammable Liquids, April, 1952, make no distinction between the two fuels.

the tax would invariably eat up the jobber's entire margin before any of his costs were covered.

A heavy tax of this character, measured solely by gallonage which may be owned by someone else and taking no account of the storer's gross or net receipts,[18] or his expenses, or the duration of the storage, can hardly be said to tax the business of storing—unless it were the state's aim to drive storers out of business. However, there has obviously been no such intent on the part of the legislature. On the contrary, the exemption of gasoline destined for export[19] is proof of a positive legislative desire to protect the gasoline storage business in the state. Furthermore, a prohibitive privilege tax would not accord with Tennessee's conception that in a true privilege tax the occupation is one "in which a *profit* is supposed to be derived by its exercise from the general public". *Draughon* v. *Fox-Pelletier Corp.*, 174 Tenn. 457, 467 [Italics supplied]. The position of the tax in the Tennessee Code underscores this point, it being placed not in the sections imposing a privilege tax on "Occupations and Businesses", which begin with Section 1248.1 of the Code, but rather in a separate part beginning with Section 1126, devoted exclusively to the "Gasoline Tax."

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[18] See fn. 15, *supra*, p. 30.

[19] See *supra*, pp. 26–27.

The combination of all these factors—the well-devised system of available exemptions if the tax has previously been paid, the assurance that the tax need be paid only once, the possibilities of refund to consumers depending on their use of the gasoline, the allowance for spillage and evaporation losses, the exemptions for export and for agricultural or industrial uses, the inordinate size of the tax if it really taxed storage, the 1947 legislative declaration that the tax is a levy on the consumer, and the location of the tax in Tennessee's codified tax system—demonstrate that the Tennessee Gasoline Tax, as applied here, is not a tax on the privilege of storing but an excise on the gasoline itself or on the gasoline's consumer.[20] And it is fair and appropriate to resolve against the State any doubts as to the real nature and impact of the tax, since the State it-

[20] It makes no difference that for the purposes of the state constitution the tax may be held *not* to be laid on the gasoline or on the user [see *Foster & Creighton Co.* v. *Graham*, 154 Tenn. 412, and the opinion below, with which contrast *Tennessee Oil Co.* v. *McCanless*, 178 Tenn. 683, and *Texas Co.* v. *McCanless*, 177 Tenn. 238 (*supra*, p. 29)]. The status of the tax *for federal purposes* is independent of its standing under state law. See *Howard* v. *Commissioners of the Sinking Fund of the City of Louisville*, this Term, No. 295, decided February 9, 1953, slip op., p. 5, and cases cited *supra*, p. 19.

Furthermore, it is relevant to stress that the Tennessee Supreme Court has described these gasoline taxes in different terms at different times. As suggested in the preceding paragraph, the tax involved here has been said by that court

self made clear to Esso and the United States, during the critical period, that the tax would not be levied, and thereby made it unnecessary for the parties to the arrangement to modify its form or terminate it, or to obtain a possible Congressional exemption (*supra*, p. 7).

B. A TAX ON GOVERNMENT GASOLINE OR ON THE GOVERNMENT ITSELF IS INVALID EVEN IF COLLECTED THROUGH A PRIVATE PERSON

As was pointed out in *United States* v. *Allegheny County*, 322 U. S. 174, 176–177, since *McCulloch* v. *Maryland*, 4 Wheat. 316, no decision of the Court has questioned that, in the absence of Congressional consent, the Government's activities and property, real and personal, are immune from taxation by the states and their political subdivisions.[21] The *Allegheny County* decision (see 322 U. S. at 177, 189, 192) and *Mayo* v. *United States*, 319 U. S. 441, 447–448, suffice to show that the principle is still applied

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to be imposed on the privilege of storing and also said to be laid on the gasoline itself. And the inspection tax invalidated as applied here (*supra*, pp. 7, fn. 3, 29) was described in the opinion below as an "excise tax on the commodity" itself (R. 8), but has also been said to be an "excise tax on the sale, use or storage" of the gasoline. *State* v. *Nashville, C. & L. Ry. Co.*, 176 Tenn. 24, 28; *Texas Co.* v. *McCanless*, 177 Tenn. 238, 241; R. 316 (opinion of Chancery Court).

[21] Two unreported cases to the contrary were apparently affirmed by an equally divided Court at the December Term, 1849. Their facts are stated in *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 175–177, but, as pointed out therein, they have no weight as authority.

with undiminished vigor. It automatically follows from this controlling rule that the Tennessee tax cannot withstand attack, if, as we urge above, it is actually levied in this instance on Federal property [22] or on the United States itself.[23]

[22] Of course, it is irrelevant that the tax is a flat one and not *ad valorem*. As indicated in fn. 20, *supra*, Tennessee recognizes the concept of an excise tax on property. See the portion of the opinion below which invalidated the inspection tax (*supra*, p. 7) (R. 8).

[23] Tennessee cannot support the tax, as applied here, on the theory that its general police power authorizes it to control or tax a volatile, inflammable substance like gasoline, even as against the United States—nor did the state courts seek to rest on that ground (see R. 8, 12, 314–317). Under the principle of federal immunity, a state is wholly disqualified from interfering with the property, operations, or functions of the United States. Because the United States "may perform its functions without conforming to the police regulations of a State", it may construct a dam and reservoir in a state without securing approval of its plans and specifications by the state engineer as required by state statute (*Arizona* v. *California*, 283 U. S. 423, 451); and it may operate soldiers' homes without complying with state inspection or police regulations (*Ohio* v. *Thomas*, 173 U. S. 276). So, too, the driver of a mail truck for the Post Office Department cannot be required to comply with state driving-license requirements (*Johnson* v. *Maryland*, 254 U. S. 51; cf. *Railroad Co.* v. *Lichtenberg*, 176 Md. 383, appeal dismissed, 308 U. S. 525), nor may federal agents in a national forest and game preserve be subject to the hunting restrictions of the state in which preserve is located (*Hunt* v. *United States*, 278 U. S. 96). These cases ar controlling. They have not lost their vitality, but, indeed, were cited with approval by this Court in *Penn Dairies, Inc.* v. *Milk Control Comm'n*, 318 U. S. 261, 269, and the principle was categorically reaffirmed in *Mayo* v. *United States*, 319 U. S. 441, "Whatever jurisdiction the State may have over the place

No problem is raised by the circumstance that the tax is collected from Esso rather than from the United States. Of the many cases holding the Government's property immune from state taxation, only two (*Clallam County* v. *United States,* 263 U. S. 341, and *Mayo* v. *United States,* 319 U. S. 441) involved attempts to collect taxes or fees directly from the United States. In the other cases, the local authority proceeded for collection against a private person. For instance, in *Van Brocklin* v. *Tennessee,* 117 U. S. 151, which is typical of several, the United States obtained title to three lots upon nonpayment of federal taxes, and held them for some 13 years. After one lot had been redeemed by Van Brocklin and the others sold, the state brought a bill in equity against Van Brocklin and the purchaser to enforce by sale liens for taxes assessed with respect to the years when title was in the United States. It was held that the property was not subject to the asserted liens. See also, *e. g., Lee* v. *Osceola Imp. Dist.,* 268 U. S. 643; *Mullen Benevolent Corp.* v. *United States,* 290 U. S. 89;

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or ground where the institution is located, it can have none to interfere with the provision made by Congress for furnishing food to the inmates of the home, nor has it power to prohibit or regulate the furnishing of any article of food which is approved by the officers of the home, by the board of managers and by Congress. Under such circumstances the police power of the State has no application". *Ohio* v. *Thomas,* 173 U. S. 276, 283. See also *United States* v. *Allegheny County,* 322 U. S. 174, 176–177.

Maricopa County v. *Valley Bank*, 318 U. S. 357.[24] Even though the state proceeds solely against the private person, it is the Government or its property which is in effect being taxed. Indeed, the private individual would be unlikely to proceed unless the Government first assumed the liability for the tax, just as the "numerous persons" referred to in the *Mayo* case (319 U. S., at 443) were unwilling "to proceed with the distribution of the fertilizer" without protection from the Florida statute. Such an agreement of indemnification was given Esso in the instant case by its contract (*supra*, pp. 3, 17), for much the same reason. And in all of these situations the Government, as the real party in interest, is

[24] Other cases invalidating tax assessments against third persons are: *Railway Co.* v. *Prescott*, 16 Wall. 603; *Railway Co.* v. *McShane*, 22 Wall. 444; *Colorado Co.* v. *Commissioners*, 95 U. S. 259; *Sargent* v. *Herrick*, 221 U. S. 404; *Hussman* v. *Durham*, 165 U. S. 144; *Northern Pacific R. R. Co.* v. *Traill County*, 115 U. S. 600.

In *Mayo* v. *United States*, 319 U. S. 441, the state's "stop sale" notice was directed to a federal instrumentality, the county agricultural association, rather than to a private person. But it is perfectly clear from the opinion that the state's action would not have been viewed in a more favorable light had the state officials waited until the bags of fertilizer were in the hands of the farmers, and then seized and sold them for lack of labels evidencing payment of the inspection fee. The District Court's decree, affirmed by this Court, was sufficiently broad to prevent such interference with the Government's program at any point. See Record in No. 726, October Term, 1942, pp. 116–117. The Court's opinion cited with approval the *Van Brocklin* case (319 U. S., p. 447, fn. 11).

subjected to the same administrative and fiscal burdens as though the tax were collected directly from the Treasury.[25]

United States v. *Allegheny County*, 322 U. S. 174, is a closely comparable and recent decision. Real property was owned by Mesta Machine Company, a Government contractor, and affixed machinery belonged to the United States. The tax sought to be collected from Mesta related to the United States' machinery but the county sought to justify it on the ground that it was formally levied on Mesta's realty and was merely measured or enhanced by the Government's personalty. Looking at the tax for itself, this Court determined that the substance of the imposition was on the Government's property and therefore invalid. Emphasizing that neither ingenuity in calculation nor form of words in state enactments can deprive the United States of its well-established immunity from state taxation, the Court made several definitive declarations which are entirely *a propos* re (pp. 187–188, 188–189, 192):

> We think, however, that *the Government's property interests are not taxable*

[25] In other types of cases, the Court has also recognized (*Colorado Bank* v. *Bedford*, 310 U. S. 41, 52) that—

"The person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself."

See *Stahmann* v. *Vidal*, 305 U. S. 61; *McGoldrick* v. *Berwind-White Coal Co.*, 309 U. S. 33, 43, 49; *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 361–362, 363–364.

either to it or its bailee. The "Government" is an abstraction, and its possession of property largely constructive. Actual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its behalf and for its purposes. He may be an officer, an agent, or a contractor. His personal advantages from the relationship by way of salary, profit, or beneficial personal use of the property may be taxed as we have held. *But neither he nor the Government can be taxed for the Government's property interest.* Rarely does a State or municipality pursue the Federal Government itself. Most of the immunity cases we have been called upon to deal with involved assertion of a right to tax Government property against an individual.

* * * * *

A State may tax personal property and might well tax it to one in whose possession it was found, but it could hardly tax one of its citizens because of moneys of the United States which were in his possession as Collector of Internal Revenue, Postmaster, Clerk of the United States Court, or other federal officer, agent, or contractor. *We hold that Government-owned property, to the full extent of the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds it as a bailee.*

* * * * *

> The Tax Law of the Commonwealth of Pennsylvania as interpreted and applied in this case violates the Federal Constitution in so far as it purports to authorize taxation of the *property interests of the United States in the machinery in Mesta's plant, or to use that interest to tax or to enhance the tax upon the Government's bailee.* * * * [Italics supplied.]

In this case, too, the tax is collectible from the contractor-bailee, and is formally designated as imposed on a non-immune subject, *i. e.*, the contractors's privilege of doing business within Tennessee. But, as in *Allegheny County*, the reality is that the tax is laid on Government property or on the Government itself, as consumer and user of the gasoline.

C. THE RULINGS OF THIS COURT ON WHICH TENNESSEE RELIES DO NOT SUPPORT THE DECISION BELOW

None of this Court's decisions brought forward by the State to support the ruling below can serve that function. All involve a tax on a contractor's own advantages from his contract by way of receipts, profit, or beneficial use of property, rather than an impost on the Government or its property.

James v. *Dravo Contracting Co.*, 302 U. S. 134, concerned a tax laid on the Government contractor's gross receipts; there was no claim that the tax was imposed either on the Government's property or on the United States itself. Simi-

larly, the taxes in *Alabama* v. *King & Boozer*, 314 U. S. 1, and *Curry* v. *United States*, 314 U. S. 14, were state sales and use taxes held to be imposed on purchases of materials by a Government cost-plus contractor. As in *Dravo*, the taxes reached only the contractor's purchases and use of the property, not the Government; "the fact that materials are destined to be furnished to the Government does not exempt them from sales taxes imposed on the contractor's vendor" (*United States* v. *Allegheny County*, 322 U. S. 174, 186).[26] In the same category is *Penn Dairies* v. *Milk Control Comm'n*, 318 U. S. 261, which validated price control imposed by a state on a contractor with the United States. The regulation had its direct impact on the contractor; comparable controls attempted to be imposed on the Government would have met the same fate as the regulation overthrown in *Mayo* v. *United States*, 319 U. S. 441. Cf. *Pacific Coast Dairy, Inc.* v. *Dept. of Agriculture*, 318 U. S. 285. Likewise, in *Wilson*

[26] The overruling, in *Alabama* v. *King & Boozer*, 314 U. S. 1, 9 (see *Penn Dairies, Inc.* v. *Milk Control Comm'n*, 318 U. S. 261, 277), of *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, and *Graves* v. *Texas Company*, 298 U. S. 393, involving gasoline taxes denominated as "privilege" taxes, has no bearing on the validity of the present tax. In the *Panhandle Oil* and *Texas Company* cases, the fact that the tax was called a "privilege" tax was unimportant, because the taxpayer-company owned the gasoline which was only later *sold* to the United States. A direct tax on such privately-owned gasoline would today clearly be held valid.

v. *Cook*, 327 U. S. 474, 482–483, sustaining a state privilege tax on one who purchased and severed timber on Government-owned lands, there was no attempt to reach federal property or to tax the timber itself, even though the United States still owned the timber until the purchase price was paid; the Court expressly reserved (because not properly before it) all questions relating to possible liens against, or imposition of the tax upon, the Government (327 U. S. at 483–485).

In all of these cases, "the exactions directly affected persons who were acting for themselves and not for the United States". *Mayo* v. *United States*, 319 U. S. 441, 447. What was denied "is immunity for the contractor's own property, profits, or purchases". *United States* v. *Allegheny County*, 322 U. S. 174, 186. The tax or regulation was imposed on the contractor as part of *his* obligation of citizenship, and it was not the scheme of the statute to make him a mere conduit for the taxation or regulation of the person in the position of the United States. As we have shown (*supra*, pp. 17–35), we have here the contrary situation:—a statutory scheme designed in this instance to make Esso a conduit for taxing the Government as consumer or for taxing its gasoline. No prior decision of this Court permits such a tax and the historical line of authority condemns it.

II

THE TENNESSEE GASOLINE TAX UNCONSTITUTIONALLY DISCRIMINATES AGAINST THE UNITED STATES IN THAT, AS CONSTRUED BY THE STATE SUPREME COURT, IT IMPOSES A TAX WITH RESPECT TO GASOLINE OWNED BY THE UNITED STATES IN CIRCUMSTANCES WHERE THE SAME TAX WOULD NOT BE LEVIED IF OWNED BY OTHERS

A. We urge in Point I that the Tennessee tax would infringe the Federal Government's constitutional immunity even if the tax were fairly levied on others in comparable circumstances. Whether or not that is so, the tax is certainly invalid if it has been applied discriminatorily to the disadvantage of the United States and of Esso. For the unbroken doctrine in this Court is that, whatever a State's taxing laws may do, they cannot discriminate against the United States or against private persons who deal or contract with the United States. Such discrimination is outlawed by the Supremacy Clause and by the constitutional implications of our federal system, as well as by the Equal Protection Clause of the Fourteenth Amendment. *New York* v. *United States*, 326 U. S. 572, 575–576, 584–585, 586; *Penn Dairies, Inc.* v. *Milk Control Comm'n*, 318 U. S. 261, 269; *Alabama* v. *King & Boozer*, 314 U. S. 1, 8; *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 480, 488; *Helvering* v. *Gerhardt*, 304 U. S. 405, 413, 420, 425; *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, 385, 386; *James* v.

Dravo Contracting Co., 302 U. S. 134, 149, 157, 158, 164 (fn. 13), 170–171, 172; *Taber* v. *Indian Territory Co.*, 300 U. S. 1; *Schuylkill Trust Co.* v. *Pennsylvania*, 296 U. S. 113, 120; *Indian Territory Oil Co.* v. *Board*, 288 U. S. 325, 327–328; *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 131; *Pacific Co.* v. *Johnson*, 285 U. S. 480, 493–495, 496; *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279, 282; *Alward* v. *Johnson*, 282 U. S. 509, 513–514; *Willcuts* v. *Bunn*, 282 U. S. 216, 225, 226, 229; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 392; *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 631–632; *Miller* v. *Milwaukee*, 272 U. S. 713, 715; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 525.[27]

Such an invalid discrimination is revealed by the course of decisions of the Tennessee Supreme Court. In *Tennessee Oil Co.* v. *McCanless*, 178 Tenn. 683, in 1941, the Supreme Court held the Tennessee gasoline tax inapplicable to a situation hardly distinguishable in pertinent facts from this one—except that the United States was not involved. The Obion County Board made an arrangement with an oil company by which the latter procured out-of-state gasoline for the board

[27] See also, to the same effect, the dissenting opinions in *Brush* v. *Commissioner*, 300 U. S. 352, 375, 378; *Schuylkill Trust Co.* v. *Pennsylvania*, 296 U. S. 113, 123 *ff*; *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 638; *National Life Ins. Co.* v. *United States*, 277 U. S. 508, 530–531; *Long* v. *Rockwood*, 277 U. S. 142, 149, 150.

at cost plus freight, had it shipped to Tennessee, stored it in a tank leased to the board for one dollar, and then delivered it on order of the board, at a charge of two cents per gallon. The State taxing authorities sought to tax the oil company with respect to the gasoline. In voiding the tax, the Supreme Court stated (pp. 691–692):

> Counsel for the state concede that gasoline shipped in interstate commerce directly to a county or city and used by such governmental unit for governmental purposes is exempt from the gasoline tax. *State ex rel* v. *Southern Oil Service*, 174 Tenn. 232, 124 S. W. (2d) 704; *State* v. *Hamilton County*, 176 Tenn. 519, 144 S. W. (2d) 749. But, it is insisted the gasoline must be shipped to the governmental unit and controlled by it. *The determinative question is: To whom does the gasoline belong when it comes to rest in the State of Tennessee?* If it belongs to the governmental unit, it is exempt from taxation. The fact that the gasoline here in question was delivered into a tank leased from complainant rather than into a tank owned by the County Board of Education is immaterial. The delivery made passed title to the County Board of Education and complainant's connection thereafter with the gasoline was merely that of agent of the Board to make deliveries as directed by the Board. [Italics supplied.]

Since the board, an exempt agency, owned the gasoline, the State could not "impose a tax on the gasoline in question" (178 Tenn., at 692).

We emphasize that the court held that "The determinative question is: To whom does the gasoline belong when it comes to rest in the State of Tennessee? If it belongs to the governmental unit, it is exempt from taxation." Ownership of the gasoline was held to be the all-important factor in the case of an exempt agency. Furthermore, the court appeared to reject, as tests of taxability, both direct control of the gasoline and ownership of the tank. It mentioned the State's contention that control by the governmental unit was necessary for exemption, saying "it is insisted the gasoline must be shipped to the governmental unit and *controlled* by it." [Italics supplied.] But it ignored this argument in favor of ownership of the gasoline, and then selected title to the gasoline over ownership of the tank, saying that "The fact that the gasoline here in question was delivered into a tank leased from complainant rather than into a tank owned by the County Boar dof Education is immaterial."

In its discussion of the *Tennessee Oil* case in the opinions below (R. 9, 25), the Supreme Court seems to stress the "one-dollar lease" of the tank to the county board as a decisive factor, but in the *Tennessee Oil* case itself it found the "determina-

tive" issue to be the ownership of the gasoline, not of the tank; the lease was considered in the opinion as simply one indication of the ownership of the gasoline (which was not otherwise very clear). Moreover, in *Tennessee Oil* the oil company did the actual handling, storing, and delivering, in addition to keeping records, supplying guards, etc., with its own personnel, just as in the instant case. To make a heavy tax now turn on the existence *vel non* of a formal "one-dollar lease" merely emphasizes the inherent discrimination the court reads into the statute.[28]

The *Tennessee Oil* decision and the instant case, taken together, indicate that where the United States is not concerned the State looks to the ownership of the gasoline to determine taxability—at least where a claim of exemption is made—but where the United States is the

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[28] If the Tennessee taxing authorities, in the period from 1943 to 1946 when the arrangement was operative, had sought to rest the tax on this formal distinction, the United States and Esso would undoubtedly have added a clause to the contracts making such a "one-dollar lease". In that respect, the State Supreme Court's opinion either errs when it says that (R. 10–11) "the record does not show that Esso was prejudiced in any way by a failure to collect the tax", or it means that entering into a "one dollar lease" would not have saved Esso from the tax. As to the latter view, see the argument *infra*, pp. 48–51 on discrimination against Esso and the United States. Esso was further prejudiced by the delay, since, had an earlier attempt been made to collect the tax, Esso would have claimed the lower rate available for export gasoline at the time (see R. 10, 19–20, 25).

owner it looks solely to the storer or distributor.[29] No reason for this difference is or can be given, except the desire to claim a tax which would otherwise be uncollectible. Such unequal treatment of the United States and its contractor, whether by a state legislature or by the state judiciary, must fall under the principle of the cases cited above at pp. 44–45. In *Miller* v. *Milwaukee*, 272 U. S. 713, for example, a Wisconsin tax which included dividends paid to stockholders in their taxable net income only so far as the corporation itself had been exempt from taxation on its income, was held invalid to the extent that the corporation's exemption from taxation arose with respect to income paid upon United States bonds (then exempt from direct income taxation). The Court, speaking through Mr. Justice Holmes, held that the statute indicated an obvious attempt to reach income which was constitutionally exempt, stating (p. 715):

> If the avowed purpose or self-evident operation of a statute is to follow the bonds of the United States and to make up for its inability to reach them directly by indirectly achieving the same result, the statute must fail even if but for its purpose or

[29] In 1941 and 1943, Tennessee amended its statutes to provide special provisions for the exemption of state governmental units (2 Williams Tennessee Code, Sec. 1148.22), but the State Supreme Court did not refer to, or rest on, these provisions.

> special operation it would be perfectly good, Under the laws of Wisconsin the income from the United States bonds may not be the only item exempted from the income tax on corporations, but it certainly is the most conspicuous instance of exemption at the present time. A result intelligently foreseen and offering the most obvious motive for an act that will bring it about, fairly may be taken to have been a purpose of the act. * * * A tax very well may be upheld as against any casual effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them, but it becomes a more serious attack upon their immunity when they are its obvious aim. In such a case the Court must consider the public welfare rather than the artifices contrived for private convenience and must look at the facts.

B. The Equal Protection Clause is also applicable in this case to bar Tennessee from discriminating against Esso by imposing a tax where the State Supreme Court, by adhering in this case to the rationale of the *Tennessee Oil* decision (R. 9, 25), has indicated that for other companies in similar circumstances the tax, if collectible at all, would be on the owner of the gasoline and not on the storer. The differences between the position of the Tennessee Oil Company in the earlier case and of Esso here are so

slight as not to warrant the difference in tax treatment. Both companies were performing the same functions under very similar arrangements (R. 18). See *Hillsborough* v. *Cromwell*, 326 U. S. 620, 623. For elaboration of this argument, see Esso's Brief in No. 330, at pp. 8 *et seq.*

C. These issues of unlawful discrimination were seasonably raised in the state courts. It was argued to the Supreme Court of Tennessee, in Esso's brief on the original hearing, that the court's prior decisions (particularly *Tennessee Oil Co.* v. *McCanless*, 178 Tenn. 683) required a holding that the tax was inapplicable here. The brief added (p. 42): "Necessarily the same rule must be applied when the implied immunity of the United States is involved; otherwise Tennessee has discriminated against the United States." *Tennessee Oil* was apparently the only prior case in which an attempt had been made to assess the gasoline tax against a bailee where the owner was an immune governmental unit. It was to be assumed that the Supreme Court would either overrule that case or apply it. Instead, the court adhered to its decision in the *Tennessee Oil* case, and at the same time affirmed the lower court (which had ignored the *Tennessee Oil* case in its opinion) on the ground that the two cases were distinguishable. When the State Supreme Court refused to apply the *Tennessee Oil* rule to the

instant case, at the same time adhering to its prior decision, the Equal Protection Clause was raised in Esso's petition to rehear (R. 16–19).

The rule which declares ineffective an attempt to raise a federal question in a petition for rehearing yields, of course, to the governing principle that the state practice must afford a litigant an opportunity to have the claimed federal right heard and determined, and that, even if the state court refuses to pass upon the question, the raising will be timely if the question is advanced at the earliest opportunity. Accordingly, the raising of the federal question in a petition for rehearing is timely if it appears that the question was first brought into the case by an unexpected decision of the highest state court and that the litigant had no prior opportunity to assert the claimed federal immunity. *Ohio* v. *Akron Park District,* 281 U. S. 74, 79; *Missouri* v. *Gehner,* 281 U. S. 313, 320; *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673, 677–678; *Cole* v. *Arkansas,* 333 U. S. 196, 200 (with which compare *Cole* v. *Arkansas,* 338 U. S. 345). See *Wilson* v. *Cook,* 327 U. S. 474, 485; *Butler Brothers* v. *McColgan,* 315 U. S. 501, 510; *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 164. See also *Saunders* v. *Shaw,* 244 U. S. 317; *Grannis* v. *Ordean,* 234 U. S. 385, 392. Cf. *Internat. Steel Co.* v. *Surety Co.,* 297 U. S.

657; *Herndon* v. *Georgia*, 295 U. S. 441; *Hartford Life Ins. Co.* v. *Johnson*, 249 U. S. 490.[30]

CONCLUSION

The judgment of the Supreme Court of the State of Tennessee should be reversed.

Respectfully submitted.

WALTER J. CUMMINGS, JR.,
Solicitor General.

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
OSCAR H. DAVIS,
LEE A. JACKSON,
BERRYMAN GREEN,
ROBETR B. ROSS,
Special Assistants to the Attorney General.

FEBRUARY 1953.

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[30] This Court has jurisdiction to consider those issues discussed herein which may not be appealable under 28 U. S. C. 1257 (2), but are reviewable by certiorari under 28 U. S. C. 1257 (3), since all such issues are included in the Assignment of Errors (R. 323–4) (*supra*, pp. 9–11). See *Flournoy* v. *Wiener*, 321 U. S. 253, 263; *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530, 547. See also 28 U. S. C. 2103.

APPENDIX

2 Williams Tennessee Code, Annotated (1934)

GASOLINE TAX

1126. *Definitions.*—As used in this statute the term "person" means and includes every individual, firm, association, joint-stock company, syndicate, and corporation.

The term "distributor" means and includes every person who engages in the business in the state of refining, manufacturing, producing, or compounding gasoline or distillate, and selling or storing the same in this state; and also every person who engages in the business in this state of transporting, importing, or causing to be imported, gasoline or distillate into this state, and distributing, storing, or making original sales of the same in this state, for any purpose whatsoever.

The term "original sales" as used in the definition of "distributor" shall mean the first sale made in this state after gasoline shall have been produced, refined and/or shipped or imported into this state, whether such sale shall be wholesale or retail, and/or to one for resale or use.

The term "dealer" means and includes every person other than a distributor, who engages in the business in this state, of distributing or selling gasoline or distillate within this state, and also every person who uses or consumes gasoline (except use or consumption in interstate commerce) when such gasoline has not previously been the

measure of a privilege tax under this statute.

The term "gasoline" means and includes (a) the volatile substance produced from petroleum, natural gas, oil shales, or coal heretofore sold under the name of gasoline, (b) any volatile substance or product less than 112 Fahrenheit flash test when tested in a manner approved by United States bureau of mines derived wholly or in part from petroleum, natural gas, oil shales, or coal, and (c) benzol and/or any other volatile substance used wholly or in combination with gasoline as a liquid fuel.

The term "gallon" shall mean the amount of gasoline, at a temperature of sixty degrees (60) Fahrenheit, necessary to completely fill a standard United States, gallon liquid measure. (1923, ch. 58, sec. 1; 1925, ch. 20; 1929, ch. 124; 1933, ch. 130, sec. 1; 1937, ch. 202, sec. 1.)

1127. *Distributors tax on gasoline and distillate; original packages excepted; distribution to service stations as sales.*— Every distributor when engaged in such business in this state, shall pay to the state comptroller, through commissioner of finance and taxation, for the exclusive use of the state, a special privilege tax, in addition to all other taxes, for engaging in and carrying on such business in this state, in an amount equal to six cents for each gallon of gasoline, and six cents for each gallon of distillate refined, manufactured, produced, or compounded by such distributor and sold, stored or distributed by him in this state, or shipped, transported or imported by such distributor into, and distributed, stored or sold

by him within this state, during such year; provided that no gasoline or distillate shall be included in the measure of the tax liability of a distributor unless said gasoline or distillate shall have previously come to rest within the meaning of the interstate commerce clause of the federal constitution; provided, further, that all gasoline and distillate distributed by any distributor to any of its service stations in this state shall be deemed to have been sold, and shall be treated in the same manner as though the same had been sold to dealers or other persons. (1923, ch. 58, sec. 2; 1925, chs. 13, 20; 1929, ch. 27; 1931, ch. 40, sec. 1; 1933, ch. 130. sec. 2)*

1128. *Dealer's privilege tax on gasoline and distillate; original packages excepted.*—Every dealer each year, when engaged in such business in this state, shall pay to the state comptroller, through the commissioner of finance and taxation, for the exclusive use of the state, a special privilege tax, in addition to all other taxes, for engaging in such business in this state, equal to six cents for each gallon of gasoline and six cents for each gallon of distillate sold or distributed or stored or used or consumed by such dealer in this state during such year; provided, that gasoline or distillate previously identified as a measure of tax liability of a registered distributor shall not be included in the measure of said dealer's tax liability; pro-

*An additional tax of one (1¢) cent per gallon of gasoline is provided for by the Acts of 1931, Second Extra Session, Chapter 11, and the Acts of 1933, Chapters 103, 117, and 118.

vided, further, that no gasoline or distillate shall be included in the measure of any dealer's tax liability unless said gasoline or distillate shall have previously come to rest within the meaning of the interstate commerce clause of the federal constitution. Provided, further that no gasoline or distillate shall be included in the measure of any dealer's tax liability when such gasoline or distillate was delivered within another state into the tank of the motor vehicle using it. (1923, ch. 58, sec. 3; 1925, ch. 467, sec. 2; 1929, ch. 27; 1931, ch. 40, sec. 1; 1933, ch. 130, sec. 3; 1937, ch. 202, sec. 2.)

1128.1. *Refund when gasoline used for industrial purposes.*—The tax on all gasoline, other than on gasoline as defined in section 1126, subsection (a) of the fifth paragraph, shall be refunded when used for industrial purposes and not used in internal combustion engines, subject to such general limitations and regulations as the commissioner may prescribe. The users of gasoline claiming the benefit of this section must obtain annually from the department of finance and taxation an "industrial user's permit" and the commissioner of finance and taxation is empowered to prescribe rules and regulations covering refunds; but a refund shall not be allowed until such rules and regulations are fully complied with. (1937, ch. 288, sec. 1.)

1129. *Monthly payments.*—Such tax shall be paid in monthly installments. If the tax shall not be paid on or before the 20th day of said succeeding month, it shall become delinquent, and subject to a penalty of one per cent. per day for not exceeding ten days, and it shall be the duty of the

comptrolier to proceed to collect same, with the penalty and interest by a distress warrant against the delinquent and his surety, and/or suit. (129, ch. 124, sec. 2.)

1130. *Loss of gallonage, allowances for, reports, proof.*—Allowance under general rule, covering loss of gallonage resulting from evaporation, handling, and unloading, must be uniform for all distributors, and other persons, required to pay the tax. Such allowance shall be based on gallonage shipped from the refinery as shown by the refinery invoice; provided, however, that where the gallonage shipped as shown by the refinery invoice is less than the gallonage actually received by the distributor or other person required to pay the tax, the allowance shall be based on the gallonage actually received.

Allowance under special rule, covering loss of gallonage due to fire, flood, storm, theft or other causes over which distributor has no control (exclusive of loss resulting from causes listed under general rule) will be made provided that such loss is immediately reported to the commissioner of finance and taxation; and further provided that an affidavit is made before a notary public setting out a complete description of the loss sustained, together with the further facts as to the nature of the casualty and date and time it occurred; provided that such proof of loss shall be satisfactory to the commissioner. (1923, ch. 58, sec. 5; 1925, ch. 19, sec. 2; 1933, ch. 130, sec. 4; 1939, ch. 229, sec. 1.)

1131. *Records kept by dealers and distributors, invoices of carriers, penalty.*—Each person refining, storing, selling, distributing, or handling gasoline or distillate

in this state, shall keep a record showing from whom the same was received, the date of its receipt, and the number of gallons received, together with such other further and different information as the commissioner may require.

Persons transporting gasoline or distillate not previously identified as a measure of the tax liability of a registered distributor, shall have at all times with them subject to scrutiny of representatives of the department of finance and taxation and all peace officers a true record showing where and from whom the gasoline or distillate was received, day and time of receipt, number of gallons, destination, and such other, further, and different information as the commissioner may require.

Persons transporting gasoline and distillate previously identified as a measure of the tax liability of a registered distributor, shall, if the quantity transported exceeds forty gallons, be subject to the provision of the foregoing paragraph.

Violation of any of the provisions of this section is hereby declared to be a misdemeanor and shall be punishable by a fine of not less than twenty-five ($25.00) dollars nor more than fifty ($50.00) dollars for each offense. (1923, ch. 58, sec. 5; 1933, ch. 130, sec. 5.)

1132. *Monthly reports of distributors.*— Each distributor must, within twenty days after the end of each month, make out in duplicate, on forms prescribed by the commissioner of finance and taxation, and deliver to the said commissioner, a true statement showing the total number of gallons of gasoline or distillate compounded, refined, manufactured, or produced by him

in this state, and/or the number of gallons of gasoline or distillate transported, imported, or caused by him to be imported into this state; also a true statement showing the number of gallons stored, sold, or distributed by such distributor during the month, the total amount due the state as privilege taxes for such month, together with such other further and different information as the commissioner shall require. (1923, ch. 58, sec. 6; 1925, ch. 19, secs. 2, 3; 1933, ch. 130, sec. 6.)

1133. *Those not distributors, statement required.*—Each person other than a distributor who may be required under the foregoing sections to pay the privilege tax on gasoline or distillate, shall file a statement with the commissioner of finance and taxation as required by section 1132 and shall conform in all other respects to the provisions of said section. (1923, ch. 58, sec. 6; 1925, ch. 19, secs. 2–5; 1933, ch. 130, sec. 7.)

1134. *Commissioner's action on reports.*—The commissioner shall file one of such statements in his office and shall deliver the duplicate copy thereof to the comptroller. (1923, ch. 58, sec. 6; 1933, ch. 130, sec. 8.)

1135. *Distributors and dealers to pay when reports filed.*—Each distributor and each dealer must, within twenty days after the end of each such month, and at the same time the statement required by sections 1132–1134, is delivered to the commissioner of finance and taxation, pay the comptroller through commissioner of finance and taxation the amount of the privilege tax shown by such statement to be due for the month for which the statement is made and filed.

(1923, ch. 58, sec. 7; 1925, ch. 19, secs. 2, 3; 1933, ch. 130, sec. 9.)

1136. *Unlawful to fail to report or to make a false report, penalty.*—It shall be unlawful for any distributor or dealer to fail, neglect, or refuse to make and file any statement required by the provisions of said sections, in the manner, or within the time therein provided, or to make any such statement false in any particular.

Any person violating the provisions of this section shall be deemed guilty of a misdemeanor and shall be fined not less than twenty-five dollars nor more than fifty dollars for each offense. (1923, ch. 58, sec. 8; 1933, ch. 130, sec. 10.)

1137. *Delinquent taxes, enforcing payment, penalties.*—Upon the failure of any person engaged as distributor or dealer to make and deliver to the commissioner of finance and taxation the statement above provided for, or to pay the taxes due, it shall be the duty of the commissioner to revoke his permit, and immediately to proceed to inform himself as best he may regarding the matters and things to be set forth in such statement, and, from such information as he may be able to obtain, to make a statement, showing such matters and things, and determine and fix the amount of the privilege tax due the state from such delinquent person, and proceed to collect said amount, including a penalty of one per cent. per day, for not exceeding ten days, and interest, by the issuance of a distress warrant against the delinquent and the surety on his bond, and, if necessary, by suit on the bond. Upon the request of the commissioner of finance, it shall be the duty of the attorney-general to institute

and prosecute to conclusion all proper and necessary suits for the collection of the taxes. (1929, ch. 124, sec. 3; 1933, ch. 130, sec. 11.)

1138. *Statement prepared by commissioner presumed correct.*—Said statement, as prepared by the commissioner, shall be deemed prima facie correct, and the burden of proof shall be upon the distributor or dealer to prove its incorrectness in any action growing out of matters and things contained therein. (1929, ch. 124, sec. 3; 1933, ch. 130, sec. 12.)

1139. *Distributor to make invoices to purchasers of original packages.*—Every distributor selling any gasoline or distillate in this state, in the original packages in which shipped, transported or imported into this state by such distributor, shall at the time of making such sale, make out and deliver to the purchaser thereof, an invoice, in which invoice shall be stated the number of gallons of gasoline or distillate covered by such invoice, and that the same has been sold in the original packages in which the same was shipped, transported or imported into this state. (1923, ch. 58, sec. 10.)

1140. *Storage for export out of state, exception from act, conditions.*—Gasoline or distillate not previously the subject of an original sale in this state, stored in this state for export to points outside the state, shall not be included in the measure of the tax liability of any distributor or dealer; provided that such gasoline or distillate is stored in a separate tank marked "export tank";

Provided that a bond is executed by the distributor or dealer that in the opinion of the commissioner of finance and taxa-

tion adequately protects the state against loss of tax in case said gasoline or distillate is not subsequently exported outside the state;

Provided that gasoline or distillate stored for export longer than a period of sixty days must be included in the measure of the tax liability of the distributor or dealer so storing such gasoline or distillate. (1923, ch. 58, sec. 11; 1933, ch. 130, sec. 13.)

1141. *Commissioner of finance and taxation to collect the taxes and pay to state treasurer; expenses limited.*—It shall be the duty of the commissioner of finance and taxation to collect all taxes accruing under this law, and to issue proper receipts therefor, and to pay over all taxes so collected to the state treasurer, who shall place them to the credit of a fund to be used solely in the construction and maintenance of the highway system of the state, and not exceeding two per centum (2%) of said fund shall be used for expenses of administration, provided, however, that as to the portion of said fund going to the counties, only one per centum (1%) shall be charged and deducted therefrom for the cost of collection and administration. (1923, ch. 58, sec. 12; 1925, ch. 19, sec. 1; 1933, ch. 130, sec. 14; 1939, ch. 207, sec 1.)

1141.1. *Sections 1126–1141 and other statutes not applicable to refineries.*—Neither the inspection, the fees nor the taxes to be made or paid upon petroleum and petroleum products, particularly the statutes and laws providing for the inspection and testing of illuminating oils and volatile substances and the fees provided therefor, as set out in chapter 42 of the 1932 Code of Tennessee, being sections 6809 to 6850

thereof, both inclusive, and the laws relating to privilege taxes for dealing in and storing such products, particularly as set out in chapter 58 of the Public Acts of 1923, being sections 1126 to 1141, both inclusive, of the 1932 Code of Tennessee, as amended by chapter 130 of the Public Acts of 1933, and as set out in chapter 11 of the Public Acts of 1931, Extraordinary Session [vol. 7, p. 557], and as set out in chapter 77 of the Public Acts of 1933 [§§ 1148.1–1148.3], and as set out in the General Revenue Bill, being chapter 108 of the public Acts of 1937 [§§ 1248.1 et seq.], and any amendments to any of said laws, shall be applicable or collectible in the following cases:

(1) Upon any of such products while being transported from within or without the State of Tennessee to a petroleum refinery within the State of Tennessee for the purpose of there being refined, further refined or processed.

(2) Upon any of such products while being refined, further refined, processed or stored at a petroleum refinery within the State of Tennessee.

(3) Upon any of such products while being transported from a refinery within the State of Tennessee to another petroleum refinery within the State of Tennessee.

(4) Upon any of such products while being transported from a petroleum refinery within the State of Tennessee to a pla e outside the State of Tennessee. (1941, ch. 133, sec. 1.)

1142. *Commissioner of finance and taxation may issue distress warrant for past-due taxes; penalty; fee.*—The commissioner of finance and taxation, in the name of the state, may issue a distress warrant for the collection of such tax when past-due, and

for the penalties and costs; and a penalty of one per centum per day is imposed for the failure to pay such tax, and a fee of two dollars for the issuance of a distress warrant, and the usual commissions allowed officers collecting money by virtue of an execution issuing from a court of record; provided, however, when the penalty reaches ten per cent. no further penalty shall be collected. (1925, ch. 19, sec. 6; 1933, ch. 130, sec. 15.)

1143. *Dealers required to obtain permit.*—It shall be unlawful for any distributor or other person to engage in the business of selling, storing or distributing, in intrastate commerce, gasoline or distillate without first having obtained a permit to carry on such business from the commissioner of finance and taxation. (1929, ch. 124; 1929, ex. ses., ch. 28; 1933, ch. 130, sec. 16; 1937, ch. 202, sec. 3.)

1144. *Application.*—Every person desiring a permit to engage in said business of distributor, dealer, or distributing and storing gasoline, shall make application in writing therefor to the commissioner, on forms to be by him provided, which application shall show:

(a) The name and address of applicant;

(b) Whether individual, partnership, association or corporation, and, if partnership or association, the names and addresses of each member;

(c) Whether it is the purpose of applicant to engage as distributor, dealer, or storer, and

(d) Whether wholesale, retail, or both. (1929, ch. 124.)

1145. *Bond required.*—* * *

* * * * *

1145.1. *Deposit of collateral in lieu of bond; bond; registration.*—* * *

* * * * *

1146. *Revocation of permit, grounds, abatement of violation of act as nuisance.*—The permit of every distributor, dealer or storer who fails to keep the records, or fails to make and deliver the statements and reports required, or who fails to pay the taxes accrued before they become delinquent, or fails to make and maintain bond as required by law, shall be revoked, and the carrying on of such business thereafter shall be unlawful.

If any distributor or other person operates without a permit a business for which a permit is required under the provisions of the preceding sections he shall be guilty of a misdemeanor and shall be fined for each separate exercise of the functions of such business the sum of twenty-five to fifty dollars.

Provided, further, that the commissioner may in his discretion and in the alternative, proceed under the provisions of sections 9316 and 9317 of the Code of Tennessee, 1932, to abate and enjoin the further carrying on of said business as a public nuisance. (1929, ch. 124; 1933, ch. 130, sec. 17.)

1147. *Forms, cancelation of permits, report.*—It shall be the duty of the commissioner of finance and taxation to provide all necessary and appropriate blank forms and stationery for carrying the provisions of this law into effect, the same to be provided and paid for as other supplies for his department are provided; to cancel permits of delinquents and promptly report them to the comptroller for such pro-

ceedings as by law and this statute authorized. (Ib.; 1929, ex, ses., ch. 28; 1933, ch. 130, sec. 18.)

Public Acts of Tennessee, 1943:

CHAPTER NO. 50

Senate Bill No. 315

(By Ballew.)

AN ACT To regulate the storage and inspection of gasoline and other volatile substances where the same is manufactured in Tennessee or has come to rest in Tennessee after shipment in interstate commerce and stored in this State pending the export of such gasoline or other volatile substances to points outside the State; to fix inspection fees and provide penalties for violation of the Act.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee,* That whenever any gasoline, benzol, burning oil, distillate, fuel oil, gas oil, kerosene, naphtha, or other volatile substances reflecting a gravity of 16 degrees or above on the Baume scale, produced from petroleum, natural gas or coal, by whatever the name known, and the substitutes therefor, are stored in this State, or whenever such products have come to rest after shipment in interstate commerce and are stored in this State, except when stored at or shipped to or from a petroleum refinery located in this State, and such products are subsequently exported to points outside the State, and same shall be inspected under the provisions of the Code of Tennessee, Sections 6809–6850.6 inclusive, and an inspection fee of one-twentieth of one cent per gallon is hereby levied upon such petroleum products temporarily stored in Tennessee and subsequently exported to points outside the State. Distributors or dealers of said exported petroleum products as enumerated in this Act shall make

reports to the Commissioner of Finance and Taxation and pay all inspection fees herein levied in like manner as other oil inspection fees levied by the Code of Tennessee, Sections 6809–6850.6 inclusive.

SEC. 2. *Be it further enacted,* That any distributor, dealer or other person storing gasoline or other volatile substances enumerated in this Act for export, shall execute a bond which in the opinion of the Commissioner of Finance and Taxation adequately protects the State against loss of tax in case such gasoline or other volatile substance is not actually exported outside the State.

SEC. 3. *Be it further enacted,* That it shall no longer be necessary for distributors or dealers to maintain separate export tanks and to export gasoline or other volatile substances within sixty days as is provided by the Code of Tennessee, Section 1140.

SEC. 4. *Be it further enacted,* That all gasoline or other volatile substances as described in this Act which are exported to points outside the State, shall only be liable for the inspection fee of one-twentieth of one cent per gallon as levied in Section 1 of this Act, and there shall be no liability for gasoline taxes levied under the Code of Tennessee, Sections 1126–1148.3 inclusive, nor shall there be any liability for the inspection fees levied under the Code of Tennessee, Sections 6809–6850.6 inclusive—it being the legislative intent to make a separate classification for the gasoline and other volatile substances described herein which are exported to points outside the State.

SEC. 5. *Be it further enacted,* That the provisions of this Act shall not apply in

any case except where such gasoline or other volatile substance is exported from the State of Tennessee by common carrier or contract carrier who are duly licensed and hold certificates from either the Interstate Commerce Commission or the Railroad and Public Utilities Commission of Tennessee, or both. Provided, however, that the Commissioner of Finance and Taxation is authorized to promulgate rules and regulations permitting the export or movement to other states of the products enumerated in this Act by other modes of transportation, and the provisions of this Act shall apply where the export or movement beyond the State is made in compliance with such rules and regulations.

SEC. 6. *Be it further enacted,* That the provisions of this Act are hereby declared to be severable. If any of its sections, provisions, exceptions, sentences, clauses, phrases or parts be held unconstitutional or void, the remainder of this Act shall continue in full force and effect, it being the legislative intent now hereby declared that this Act would have been adopted even if such unconstitutional or void matter had not been included therein; that this Act take effect from and after its passage, the public welfare requiring it.

Passed: February 4, 1943

BLAN R. MAXWELL,
Speaker of the Senate.
JAS. J. BROOME,
Speaker of the House of Representatives.

Approved: February 9, 1943.

PRENTICE COOPER,
Governor.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 378

UNITED STATES OF AMERICA,

Appellant

vs.

JAMES CLARENCE EVANS AND HIS SUCCESSORS IN OFFICE, AS COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE,

Appellee

STATEMENT OPPOSING JURISDICTION

Statement by Appellee of Grounds in Opposition to Appellate Jurisdiction of the Supreme Court of the United States Pursuant to Supreme Court Rule 12.

K. HARLAN DODSON, JR.,
Counsel for Appellee.

CUMMINGS & CRABTREE,
WALKER, HOOKER, KEEBLE,
DODSON & HARRIS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 378

ESSO STANDARD OIL COMPANY AND UNITED STATES OF AMERICA,

Appellants,

vs.

JAMES CLARENCE EVANS AND HIS SUCCESSORS IN OFFICE AS COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE,

Appellee.

STATEMENT OPPOSING JURISDICTION

Statement by Appellee of Grounds in Opposition to Appellate Jurisdiction of the Supreme Court of the United States Pursuant to Supreme Court Rule 12.

Heretofore, the appellant, Esso Standard Oil Company, filed its petition and order of appeal, the same being filed on August 8, 1952, in the Supreme Court of the State of Tennessee. Thereafter, the record in this cause was certified to the Clerk of the Supreme Court of the United States

by the Clerk of the Supreme Court of the State of Tennessee within the time allowed by Rule 12 of the Rules of the Supreme Court of the United States. The appellee filed its statement of grounds in opposition to appellate jurisdiction of the Supreme Court of the United States.

On October 2, 1952, the appellant, United States of America, an intervenor below, filed its petition for appeal and order allowing its appeal, together with its assignments of error and statement of jurisdiction. The appellee files the following statement of the matters and grounds against the jurisdiction of this Court as asserted by the appellant, United States of America, all as required by Rule 12 of the Rules of this Honorable Court:

Implied Constitutional Immunity

The principle of implied constitutional immunity relied upon by the appellant United States of America to confer appellate jurisdiction upon this Court is frivolous and unsubstantial, the question having been settled by the Supreme Court of the United States in a number of cases adversely to the contention of the appellant here.

The argument proposed by the appellant, United States of America, is the same as the argument proposed by the appellant, Esso Standard Oil Company. Nothing new is contained therein, and, for the sake of brevity, the appellee relies upon its statements, citations and arguments in support of the proposition that this attempted appeal is frivolous and unsubstantial as contained in its statement in opposition to appellate jurisdiction heretofore filed in this cause in response to the appeal of the appellant, Esso Standard Oil Company.

(Appellee's "Statement Opposing Jurisdiction", *Esso Standard Oil Company* v. *James Clarence Evans*, pp. 1-17.)

The statement is made in the petition of the appellant, United States of America, that this Court is entirely free to disregard the designation of the State Court that the gasoline tax is a privilege tax. Suffice it to say, in answer to this ingenious argument that the Supreme Court of the United States, this Honorable Court, has already considered the Tennessee Gasoline Taxing Act and found in the case of *N. C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 77 L. Ed. 730, that this Act was a privilege tax exacted for the privilege of engaging in the business of storing gasoline. It is for this reason, as pointed out before in our statement opposing jurisdiction in the Esso Standard Oil Company appeal, that the case of *United States* v. *Allegheny County*, 322 U. S. 174, 64 S. Ct. 908, 88 L. Ed. 1209, has no application in the instant case.

II

The Fourteenth Amendment

The assertion that the equal protection clause of the Fourteenth Amendment was violated is insufficient to confer jurisdiction upon this Court for two reasons: In the first place, this question was not properly raised in the State Court nor decided by it; and in the second place, it is clearly a frivolous and unsubstantial assertion.

Again, nothing new is brought forth in the statement of jurisdiction filed by the United States of America in support of the appellant's contention that the equal protection clause of the Constitution has been violated by the finding of the Supreme Court of the State of Tennessee that a factual situation existed in the case of *Tennessee Oil Company* v. *Commissioner*, 178 Tenn. (14 Beeler) 683, 162 S. W. (2d) 1081, app. dis. 63 S. Ct. 34, 317 U. S. 588, 87 L. Ed. 482, which did not exist in the instant case so that the two cases were completely distinguishable; and

we thereupon respectfully refer, for the sake of brevity, to the statements, citations and arguments contained in our statement opposing jurisdiction heretofore filed upon the appeal of Esso Standard Oil Company.

(Appellee's "Statement Opposing Jurisdiction", *Esso Standard Oil Company* v. *James Clarence Evans*, pp. 15-17.)

Conclusion

WHEREFORE, we respectfully submit that the principles sought to be relied upon by United States of America to confer appellate jurisdiction upon this Court are frivolous, unsubstantial and not properly presented so that the appeal should be denied.

Dated October 11, 1952.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. 378.

UNITED STATES OF AMERICA,
Appellant,

vs.

JAMES CLARENCE EVANS, Commissioner, Etc.,
Appellee.

On Appeal from the Supreme Court of the State of Tennessee.

BRIEF FOR THE APPELLEE, JAMES CLARENCE EVANS, ETC.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. 378.

UNITED STATES OF AMERICA,
Appellant,

vs.

JAMES CLARENCE EVANS, Commissioner, Etc.,
Appellee.

On Appeal from the Supreme Court of the State of Tennessee.

BRIEF FOR THE APPELLEE, JAMES CLARENCE EVANS, ETC.

Appellee adopts the statement as contained in the brief for the United States as to "Opinions Below", "Jurisdiction", "Questions Presented", and "Statutes Involved" (Brief for United States, pp. 1-3).

STATEMENT

Appellee adopts the "Statement" as contained in the brief for the United States (Brief of the United States, pp. 3-9), excepting that appellee would show to the Court that there was a direct conflict in the evidence on the question of whether Esso Standard Oil Company was led to believe that there was no tax due.

Mr. Cletus Green, formerly an employee of the Tennessee Department of Finance and Taxation, testified that the Director of the Gasoline Tax and Oil Inspection Division advised Esso to keep a record on the government owned gasoline because somebody might have to pay a tax on the same some day (Rec. 278, 293).

Mr. R. L. Weakley, for many years the Director of the Gasoline Tax and Oil Inspection Division of the State of Tennessee, testified that he could never obtain a ruling as to whether Esso's activities in storing the gasoline was taxable or not taxable but that he advised Esso on at least two occasions during the period that they would probably have to pay the tax (Rec. 211, 217).

SUMMARY OF ARGUMENT.

The seven cent tax here involved is a privilege tax assessed against any person or corporation storing gasoline in the State of Tennessee. It has been repeatedly so construed by the Supreme Court of the State of Tennessee and has been likewise construed by this Honorable Court. Having exercised that privilege it was incumbent upon Esso to pay the State Tax, and the mere fact that the gasoline which it stored as an independent contractor belonged to the United States or the fact that the United States had agreed to reimburse Esso any taxes which it might have to pay did not give immunity to Esso so as to free it from the privilege tax.

The fact that the Supreme Court of the State of Tennessee under facts which it considered extremely distinguishable held the taxing act not applicable does not constitute any discrimination against Esso or the United States.

THE ARGUMENT.

While this court has held that where a state adopts a strained construction of its taxing act so as to impose a direct tax on the property of the United States, this court will not be bound by any such construction, this court has repeatedly given great weight to the actual effect of the state taxing act as defined by the Supreme Court of the State whose act is involved.

In support of its argument that this Honorable Court should strike down the construction given the Tennessee taxing act by the Supreme Court of Tennessee and which construction has been previously recognized by this Honorable Court,* the appellant United States cites such cases as **New Jersey Realty Title Ins. Co. v. Division of Tax Appeals**, 338 U. S. 665, and **United States v. Allegheny County**, 322 U. S. 174. In these cases this Court has found that there was a direct ad valorem levy on properties belonging to the United States. In the **New Jersey Realty Title Ins. Co. v. Division of Tax Appeals**, 338 U. S. 665, case, this Court recognized the distinction between these cases and the case at bar and stated that: "The Section here in question was not considered as imposing a tax on privilege or franchise by either the New Jersey Legislature or the taxing officials or by any of the courts below" (338 U. S. at 674).

In the case of **United States v. County of Allegheny**, 322 U. S., at 174, while striking down the tax as being an ad valorem tax on property of the United States, this Honorable Court expressly pretermitted the question of whether the bailee could have been taxed on its right of possession for the use of the property in this language: "Whether such a right of possession and use (by Mesta) in view of all

* N. C. & St. L. Railway v. Wallace, 288 U. S. 249, at 265.

the circumstances could be taxed by appropriate proceedings we do not decide." 322 U. S., at 186.

As argument in support of its insistences that the tax was a levy on the consumer or on the gasoline, the United States attempts to deduce such conclusion from the Tennessee Public Act of 1947, which was passed subsequent to the date of the exercise of the privileges herein involved, declaring the tax to be a levy on the consumer. Contrary to the insistence of the United States, the well established rule of construction in Tennessee, with which the Legislature is presumed to be familiar, is to the contrary; the correct rule being that unless the act constituted a change in existing law it would not have been passed. Such rule was recently recognized by the Tennessee Supreme Court in the case of **State ex rel. Barksdale v. Wilson et al.** (June, 1952), 250 S. W. 2d 49, at 51 (not yet reported in the official Tennessee reporter).

It is true as insisted by the United States that the privilege of storage is taxed only once and that for the storage of certain classes of gasoline there is no taxing, but the fact that reasonable classifications are made, the reasonableness of which stand unchallenged in Tennessee judicial history, does not alter or change the character, nature or incidence of the tax. It stands undisputed in this record that Esso is a distributor of gasoline products.

The statutes involved are sections 1126 et seq. of the Code of Tennessee. In section 1126 a distributor is defined as follows:

> "The term 'distributor' means and includes every person who engages in the business in the state of refining, manufacturing, producing, or compounding gasoline or distillate, and selling or storing the same in this state; and also every person who engages in the business in this state of transporting, importing, or

causing to be imported gasoline or distillate into this state, and distributing, storing, or making original sales of the same in this state, for any purpose whatsoever."

Section 1127 of the Code of Tennessee provides, in part, as follows:

"Every distributor when engaged in such business in this state shall pay to the state comptroller, through commissioner of finance and taxation, for the exclusive use of the state, a special privilege tax, in addition to all other taxes, for engaging in and carrying on such business in this state, in an amount equal to six cents for each gallon of gasoline, and six cents for each gallon of distillate refined, manufactured, produced, or compounded by such distributor and sold, stored or distributed by him in this state, or shipped, transported or imported by such distributor into, and distributed, stored or sold by him within this state, during such year . . ."

Section 1126 et seq. of the Code of Tennessee was amended in 1931 and 1933 so as to increase the tax to seven cents per each gallon of gasoline stored.

This taxing act has been often considered by the Supreme Court of the State of Tennessee and by this Honorable Court. The old act levying the privilege tax on gasoline which applied to the storage thereof was first construed by the Supreme Court of Tennessee in the case of **Foster & Creighton v. Graham**, 154 Tenn. (1 Smith) 412. In that case the court construed the Act to apply to those engaged in **storing** gasoline and then withdrawing it for sale or **other use**, the language of the Court being:

"We think the Act, when properly interpreted, not only applies to distributors and dealers in gasoline, but

applies to consumers who purchase gasoline in interstate commerce and store it, and thereafter distribute the same, or allow the same to be withdrawn from storage, **whether such withdrawal be for sale or other use.**" (Emphasis supplied.) 154 Tenn. (1 Smith) 412, at 420.

In that case the Supreme Court defined direct or property taxes and indirect or privilege taxes, noting that the latter are sometimes called excise or occupation taxes and held that the Tennessee act was not a property or ad valorem tax, but was a privilege tax levied against the distributor for the privilege of engaging in the occupation of storing gasoline.

In the subsequent case of **Quick Service Tire Co. v. Smith,** 156 Tenn. (3 Smith) 96, the Supreme Court of Tennessee said, in dealing with the privilege or occupation tax on distributors which was then in effect under the Public Acts of 1923 and 1925 as follows:

"By Chapter 58, Acts of 1923, Chapter 4, Acts of 1925, a special privilege tax of three cents a gallon in addition to all other taxes was imposed upon those engaged in the business of distributing or selling gasoline (6).

"By Chapter 67, Acts of 1925, the tax of three cents a gallon was made to apply not only to gasoline sold and distributed to consumers, but **also 'to persons, firms or corporations, dealers or distributors, storing . . . and distributing the same,'** and under this Act it was held in **Foster & Creighton Co. v. Graham,** supra, that one storing gasoline for personal use could not avoid payment of the tax of three cents a gallon on gasoline." (Emphasis supplied.) 156 Tenn. (3 Smith) at 101.

In the case of **N. C. & St. L. Railway v. Roy C. Wallace, Comptroller, etc.,** 288 U. S. 249, the Court had before it

certain questions raised by the N. C. & St. L. Railroad with respect to the same taxing act involved in the instant case. There the railroad purchased large quantities of gasoline outside of the State of Tennessee and brought it into the state in tank cars from which it was unloaded and placed in the railroad's own storage tanks and from which it was withdrawn and used by the railroad as a source of motive power in interstate railway operation in several states. This Court held that the gasoline upon being unloaded and stored ceased to be the subject of transportation in interstate commerce and lost its immunity as such from State taxation. In considering the nature, operation and effect of the very tax under consideration this Court found the tax to be a true privilege tax and upheld the assessment of the privilege tax by the State of Tennessee. In support of its conclusion this Court cited the Tennessee cases of **Foster & Creighton v. Graham**, 154 Tenn. (1 Smith) 412, and **Quick Service Tire Co. v. Smith**, 156 Tenn. (3 Smith) 96.

Again in the cases of **The Texas Co. v. Fort et al.**, and **Pan American Petroleum Corp. v. Fort et al.**, 168 Tenn. (4 Beeler) 679, the Supreme Court of Tennessee had occasion to consider the taxing act here involved. In these cases Chapter 130 of the Public Acts of Tennessee of 1933, which amended the 1923 Act, as amended by the 1925 Act, was challenged. This 1933 amendment provided that the tax should be paid by dealers and distributors measured by the amount held in storage instead of measured by the amount withdrawn from storage. The particular question was whether gasoline brought into the State before the amendment and being stored at the time of the amendment could be used as the measure of the tax as well as gasoline brought into the State after the amendment. The Supreme Court of Tennessee held that the Act as amended was a "privilege tax on engaging in the business of storing gasoline," and since it was the business of storing that was

taxed, the Act applied alike to both classes of storage (168 Tenn. [4 Beeler], at 687).

In referring to its decision in the **Foster & Creighton v. Graham**, 154 Tenn. (1 Smith) 412, case, the Supreme Court said:

> "This case settled the proposition that the tax levied by Chapter 130 is not a property tax on the gasoline placed in storage before the effective date of the Amendatory Act, **but that it is a privilege tax on the engaging in the business of storing gasoline based on the number of gallons in storage.**" (Emphasis supplied.)

In the case of **American Airways v. Wallace** (Tenn. D. C. 1932), 57 F. (2d) 877, certiorari denied by this Court in a per curiam opinion, the American Airways sought to enjoin the Commissioner of Finance and Taxation of the State of Tennessee and the Comptroller of the State from collecting the tax measured by gasoline which it purchased in tank cars outside of the State and brought by railroad into Tennessee to be stored in American Airways' private tanks until such time as it was needed, when it was withdrawn, placed into the airplanes of American Airways and used as a motor fuel; this on the basis that it was an imposition of a burden upon interstate commerce. This case was heard before a three-judge District Court consisting of Moorman, Circuit Judge, and Gore and Dawson, District Judges. In construing the Tennessee case of **Foster & Creighton v. Graham**, 154 Tenn. (1 Smith) 412, the District Court said:

> "**The statute in question does not impose a property tax upon the gasoline, but it imposes an 'excise' or 'privilege' tax upon the business of storing and withdrawing the gasoline and the amount is computed on withdrawals.**"
>
> 57 F. (2d), at 880.

The District Court further held that the storage and withdrawal being completed in Tennessee was an intrastate transaction.

Thus it becomes apparent that on every occasion regardless of what parties were involved or what Court was considering the Act, whether the State Court, the Federal District Court or this court, it has been uniformly held that the taxing act is a pure privilege tax. Appellee respectfully submits that such a characterization of the tax is the only logical one that can be given it.

The United States further attacks the Act on the theory that the amount charged for storage was not as much as the tax assessed for the privilege. What is obviously overlooked in any such argument is that the Act applies to the exercise of the privilege even though no charge is made for the storage. Such was the case in **N. C. & St. L. R. R. v. Roy C. Wallace, Comptroller, etc.**, 288 U. S. 249, and such likewise was the case in **American Airways v. Wallace** (Tenn. D. C. 1932), 57 F. (2d) 877, certiorari denied by this court. This argument likewise overlooks the fact that the exercise of the privilege of storage by Esso during this period permitted it to keep its organization and its employees which would have been difficult otherwise since, as appears from this record, practically all gasoline of the character stored belonged to the United States.

We respectfully submit, therefore, that the taxing act is in every respect a privilege tax for which Esso was liable.

If, as insisted by the appellant, United States, the tax in question is an ad valorem or property tax then its insistence would be well founded and the State of Tennessee would not be entitled to collect the tax. If, on the contrary, the tax in question is as found by the Supreme Court of the State of Tennessee, by the United States

District Court and by this Honorable Court, a privilege or occupation tax, the appellant's insistence is without merit and the mere fact that the economic burden of the tax may ultimately fall on the United States does not give any implied immunity to Esso, the taxpayer.

Under the rules of law which formerly prevailed, probably Esso would have been immune from the taxes here sought to be imposed. This is clearly shown by the case of **Panhandle Oil Co. v. Mississippi**, 277 U. S. 218. There the question involved was whether or not the State of Mississippi could impose a privilege tax on gasoline distributors measured by their gallonage, which gallonage included sales to the United States for the use of the Coast Guard Fleet and the Veterans Hospital. This Court, speaking through Mr. Justice Butler, held that it was immaterial that the seller and not the purchaser was required to report and make payment to the state, and that since the tax depended upon the number of gallons, the effect of the tax was to retard and burden the exertion by the United States of its constitutional powers. Therefore, the tax was invalid. This was upon the theory of the old **M'Culloch v. Maryland**, 4 Wheat. 316. Mr. Justices Holmes, Brandeis, Stone and McReynolds all dissented. In the later case of **Graves v. The Texas Co.**, 298 U. S. 393, this Court had before it an Alabama Excise or Privilege Tax levied upon storers of gasoline which accrued at the time of the withdrawal from storage. Some of this gasoline was withdrawn and sold to the United States for the use and performance of governmental functions. Again this Court, speaking through Mr. Justice Butler, held that the state tax on storing measured by the gallons withdrawn for sale or other use when measured by gasoline withdrawn and sold to the United States infringed the constitutional principle safeguarding the Federal Government from state taxation. Mr. Justices Cardozo and Brandeis dissented.

The first whittling at the rule of the **Graves** and **Panhandle** cases came in the case of **James v. Dravo Contracting Co.**, 302 U. S. 134. In that case the Dravo Contracting Co. had a contract with the United States to build locks and dams in certain navigable rivers located in West Virginia. West Virginia levied an occupation tax against contractors measured by gross income and sought to include in gross income the amount paid to Dravo by the United States. This Court, through Mr. Chief Justice Hughes, held that such was not a direct tax or direct burden on the Federal Government even though the imposition of the tax might increase the cost to the Government, and that, therefore, the tax was valid. With respect to the **Panhandle** case and the **Graves** case the Court held that:

> "These cases have been distinguished and must be deemed to be limited to their particular facts" (302 U. S. 151).

Finally, in 1941, in the case of **State of Alabama v. King & Boozer**, 314 U. S. 1, this Court, speaking through Mr. Chief Justice Stone, overruled the Panhandle case and the Graves case. In the King & Boozer case the State of Alabama had a sales tax under which the seller was chargeable, but was required to collect from the buyer a tax for goods sold. King & Boozer had a contract with the United States to build an Army camp. This contract was a cost plus a fixed fee contract. The State of Alabama under its state sales tax sought to require King & Boozer to pay the state sales tax on all materials which they purchased for use in the construction of the camp. This Court, speaking through Mr. Chief Justice Stone, said:

> "Congress has declined to pass legislation immunizing from state taxation contractors under 'cost plus' contracts for the construction of governmental projects. Consequently, the participants in the present transaction enjoy only such tax immunity as is afforded by the Constitution itself, ..." (314 U. S. 8).

The Court further said:

> "So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the Government, this is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right to the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see Panhandle Oil Co. v. Mississippi and Graves v. Texas Co., supra, we think it no longer tenable" (314 U. S. 8).

On the same date this Court determined the case of **John C. Curry v. United States of America**, 314 U. S. 14. In that case the Court had before it an Alabama Use Tax. The tax provided "An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased at retail . . . for storage, use or other consumption in this state at the rate of 2 per cent of the sales price of such property."

Again, it was the situation of contractors building an Army camp for the United States on a cost-plus contract basis. They had purchased roll roofing outside the state and brought into the state where they used the same in the performance of their construction contract with the Government. Speaking through Mr. Chief Justice Stone, this Court said:

> "For the reasons stated at length in the King & Boozer case we think that the contractors, in purchasing and bringing the building material into the state and in appropriating it to their contract with the government, were not agents or instrumentalities of the government; and they are not relieved of the tax,

to which they would otherwise be subject, by reason of the fact that they are government contractors" (314 U. S. 17).

Going further, the Court said:

"If the State law lays the tax upon them (the contractors) rather than the individual with whom they enter into a cost-plus contract like the present one, then it affects the government, like the individual, only as the economic burden is shifted to it through operation of the contract. As pointed out in the opinion in the King & Boozer case, by concession of the Government and on authority, the constitution, without implementation by Congressional legislation, does not prohibit a tax upon Government contractors because its burden is passed on economically by the terms of the contract or otherwise as a part of the construction cost to the Government" (314 U. S. 18).

Thereafter, there seemed to have been some confusion as to whether or not this Court intended to overrule the Panhandle case and the Graves case. This Court attempted to lay this question to rest in the case of **Penn. Dairies v. Milk Control Commission**, 318 U. S. 261, when the Court said with respect to certain opinions of the Comptroller General:

"All rest on the reasoning of the Panhandle Oil Co. v. Knox, 277 U. S. 218, and like cases, which were overruled in Alabama v. King & Boozer, supra" (318 U. S. 277).

Subsequent to the Dravo case, but prior to the decision in the King & Boozer case, the Supreme Court of North Dakota held in the case of **Federal Land Bank v. De Rochford**, 69 N. D. 382, 287 N. W. 522, that a tax on the sale of motor vehicle fuel to a Federal Land Bank was valid.

The Mississippi Supreme Court, in 1940, immediately prior to the King & Boozer case, held in the case of **Com-**

press of Union v. Stone, 188 Miss. 49, 193 Sou. 329, that a gross income tax applied to receipts from the compressing of cotton for the Commodity Credit Corporation, which was a wholly owned Federal instrumentality, was a valid tax.

In 1943 the Supreme Court of Florida, in the case of **United States v. Lee**, 153 Fla. 94, 13 Sou. (2d) 19, held that a privilege tax levied on the vendor of gasoline, which privilege tax applied to the vendor even though the sale of gasoline was to the United States, was a valid tax.

Where the Federal Congress has by specific enactment immunized from state taxation activities in furtherance of one of its instrumentalities, then such immunization is good. Such was the holding of this Court in an opinion by Mr. Justice Murphy in the case of **Federal Land Bank v. Bismark Lumber Co.**, 314 U. S. 95. The Court, however, in this case did not discuss what would have been the effect of such a tax if Congress had not so immunized the transaction and laid its decision squarely on the fact that such immunization had been granted by specific Congressional enactment.

In the case at bar there is no claim made of any congressional immunization, the reliance being solely upon implied immunity.

In the case of **Penn. Dairies v. Milk Control Commission**, 318 U. S. 261, this Court was faced with the question of whether or not the minimum price regulations of the State of Pennsylvania could constitutionally be applied to the sale of milk by a dealer to the United States, the sale being consummated within the territorial limits of the state and in a place subject to its jurisdiction. The Court held, speaking through Mr. Chief Justice Stone, that the Congress could have immunized the government from such state regulation by declaring the same inapplicable to sales

to the government, but that in the absence of such immunization by specific enactment, nondiscriminatory taxation or regulation of a contractor with the government was not invalid even though it imposed an increased economic burden on the government, this on the authority of the King & Boozer and other cases. Going further, the Court had this to say:

> "The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself, and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on the citizens of the United States within the states' borders. See Metcalf and Eddy v. Mitchell, supra (296 U. S. 523, 524, 70 L. ed. 392, 393, 46 S. Ct. 172). And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system, . . ." (318 U. S. 270).

Mr. Justice Douglas wrote a dissenting opinion in which Messrs. Justice Black and Jackson joined, but the dissent in this case was based on the proposition that Congress had indirectly required competitive bidding with respect to the purchase of all supplies and that this, in and of itself, was sufficient immunization by Congress from any minimum price regulation.

In the case of **Mayo v. United States**, 319 U. S. 441, this Court was confronted with this situation. The State of Florida had a commercial fertilizer inspection law by the terms of which every bag of fertilizer had to be inspected and an inspection fee paid before the same could be distributed. The United States Government, under its soil conservation program, purchased fertilizer outside of the State of Florida and put the same into the State of Florida there to be distributed by it as a part of the program. The State of Florida sought to stop the distribution by the United States of the fertilizer which belonged to the United States on the ground that the same was not inspected. This Court, speaking through Mr. Justice Reed, held that this could not be done because this was **a direct inspection fee charged to the United States Government** for inspecting property belonging to the United States Government. The Court's language was as follows:

> "These inspection fees are laid directly upon the United States. They are money exaction the payment of which, if they are enforceable, would be required before executing a function of government. Such a requirement is prohibited by the Supremacy Clause. We are not dealing as in Graves v. New York, supra, with a tax upon the salary of an employee, or as in Alabama v. King & Boozer, 314 U. S. 1, 86 L. ed. 3, 62 S. Ct. 43, 140 A. L. R. 615, with a tax upon the purchases of a supplier, or as in Penn. Dairies v. Milk Control Commission, No. 399, October Term, 1942, decided March 1, 1943 (318 U. S. 261, ante, 78, 63 S. Ct. 617), with price control exercised over a contractor with the United States. In these cases the exaction directly affected persons who were acting for themselves and not for the United States. These fees are like a tax upon the right to carry on the business of the Post Office or upon the privilege of selling United States bonds through Federal officials" (319 U. S. 447).

The distinction between the case of **Mayo v. United States** and the case at bar is clear. If Tennessee sought to tax the gasoline which was stored, the tax would be invalid. In like manner, if the United States was storing the gasoline in its own tanks, the tax would be invalid; but in this case the tax is on appellant for the privilege of storing the gasoline.

The Supreme Court of the State of Tennessee recognized this distinction when it refused to permit the exaction of an inspection fee because the same was a direct tax upon the commodity, as contrasted with the privilege tax on appellant for exercising the privilege of storing gasoline.

The distinction is borne out by the Supreme Court of the United States in the case of **United States v. Allegheny County**, 322 U. S. 174. In the **County of Allegheny** case Mesta Machine Company, located just out of Pittsburgh in Allegheny County, had a contract with the United States Government to manufacture big guns for ordnance. The United States Government owned certain of the machinery used in the manufacture. Allegheny County sought, under its property tax, **an ad valorem tax**, to tax to Mesta Machine the value of the machines owned by the United States. Speaking through Mr. Justice Jackson, this Court held, first, that the title to the property in question was in the United States and is effective for tax purposes. After making this holding, it found that the assessment against Mesta for the ad valorem property tax was increased, based upon the value of the machinery owned by the United States. The Court held that the ad valorem tax was not a form of personal taxation **"but rather as a tax against the property as a thing."** This Court's complete description of the transaction and its holding is contained in the following language:

> "The assessors made no claim that the temporary presence of the Government's machinery actually en-

hanced the market value or the use value of Mesta's land. The assessors simply and forthrightly valued Mesta's land as land, and the Government's machines as machinery, and added the latter to the former. We discern little theoretical difference, and no practical difference at all, between what was done and what would be done if the machinery were taxed in form. Its full value was ascertained and added to the base to which the annual rates would apply for county, city, borough, town, township, school and poor purposes.

"We hold that the substance of this proceeding is to lay an ad valorem general property tax on property owned by the United States" (322 U. S. 185).

In the case of **Smith v. Davis**, 323 U. S. 111, contractors with the United States Government sought to exclude from their assessment for ad valorem purposes the amount of an open account claim against the United States Government. This Court held that, of course, this was improper and that the ad valorem tax applied. The Court said:

"That this asset involves a claim against the Federal Government is no more fatal to the validity of the tax than the fact that in James v. Dravo Contracting Co. (Citation) the tax was levied on the contractor's gross receipts from the United States or the fact that in Alabama v. King & Boozer (Citation) the sale tax was placed on the sale of property to a contractor for use in a Federal project. **The assets of an independent contractor that are derived from the profits of a government contract stand in no preferred constitutional position so far as taxation is concerned.**" (Emphasis ours.) (323 U. S. 116.)

The clearest case on the point involved here is the case of **Wilson v. Cook**, 327 U. S. 474, where this Court was confronted with the question of whether or not a privilege

tax upon each person engaged in the business of severing from the soil for commercial purposes natural resources, including timber, was applicable to contractors severing timber belonging to the United States from land belonging to the United States within the State of Arkansas where title to the timber remains in the United States until the same had been paid for after being severed.

The statute had a further provision in it to the effect that the severer was required to collect the tax from the owner of the timber at the time of severance and gave the state a lien on the land from which the lumber was severed. With respect to the tax itself, this Court held:

> "Our decision in James v. Dravo Contracting Co. (Citation) and in Alabama v. King & Boozer (Citation) and the cases cited in these opinions, can leave no doubt that the Supreme Court of Arkansas correctly held that plaintiffs, **who are taxed by the state on their activities in severing lumber from government lands** under contract with the government, cannot claim the benefit of the implied constitutional immunity of the Federal Government from taxation by the state." (Emphasis ours.) (327 U. S. 482.)

With respect to the additional questions concerning the lien, the Court held that this had not been correctly raised in the State Court and was not properly before it, and that, therefore, it could not make any determination respecting this question.

In the recent case of **Oklahoma Tax Commission v. Texas Co.** and **Oklahoma Tax Commission v. Magnolia Petroleum Co.**, 336 U. S. 342, this Court had before it an Oklahoma Statute imposing two taxes upon the production of petroleum within the State, one a tax on the gross value of production in lieu of all other local ad valorem property taxes

and another an excise tax on every barrel of petroleum produced. The Oklahoma Tax Commission assessed both taxes against lessees of mineral rights in allotted and restricted Indiana lands. The State Supreme Court of Oklahoma, feeling itself bound by former decisions of this Court, held the assessments to be invalid on the ground that the lessee was an instrumentality of the Federal Government. In an opinion by Mr. Justice Rutledge this Court reviewed the change in theory on the doctrine of governmental immunity, quoting the provision from the **King & Boozer** case as follows:

> ". . . The Constitution, unaided by Congressional legislation . . . (does not prohibit) a tax exacted from the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as a part of the construction cost to the Government. So far as such a nondiscriminatory State tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity" (336 U. S. 359).

Mr. Justice Rutledge, in speaking of a previous decision on which the Texas Company relied, said:

> "Since that decision, as we have noted, the process has been reversed in direction. True inter-governmental immunity remains for the most part. But, so far as concerns private persons claiming immunity for their ordinary business operations (even though in connection with governmental activities), no implied constitutional immunity can rest on the merely hypotheti-

cal interferences with governmental functions here asserted to sustain exemption." (336 U. S. 365.)

A recent District Court case on the subject is the case of **Broadhead v. Borthwick**, 174 F. (2d) 21, certiorari to the Supreme Court of the United States denied October 17, 1949, 338 U. S. 847. In that case, under the Hawaii General Excise Tax Act, an excise tax was imposed on every person engaged in the business of selling any tangible personal property. These excise taxes were imposed upon Broadhead on sales made by Broadhead to Army Post Exchanges and Naval Ship Stores. The Federal District Court, in sustaining the Supreme Court of Hawaii's decision upholding the General Excise Tax as involved here, held:

> "It is clear that before 1942 or before any of the instant taxes accrued, as well as also later, the United States Supreme Court had in a series of decisions overruled the ban previously promulgated by the Panhandle case. See James v. Dravo Contracting Co. (Citation), State of Alabama v. King & Boozer (Citation), Curry v. United States (Citation), Penn. Dairies v. Milk Control Commission (Citation); in which last opinion in 1943 the Supreme Court definitely states that the Panhandle doctrine was overruled by State of Alabama v. King & Boozer, 1941, supra." (174 F. [2d] 22.)

II.

The Tax in Question as Construed by the Supreme Court of the State of Tennessee and as Levied and Collected in the Instant Case Does Not Constitute an Unconstitutional Discrimination.

As respects this second question raised by the United States in its brief (Brief for United States, pp. 44-53), we submit that the answer is three fold.

A. In the first place this question was first raised on a petition to rehear in the State Court, at which time under the rules of the State Court, it was not subject to consideration by that court. **Tennessee Oil Co. v. McCanless**, 178 Tenn. (14 Beeler) 683, at 704.

It is fundamental that this court will not consider a constitutional question on appeal from a state court where that question was not considered and ruled on by that court. **Tennessee Oil Co. v. Commissioner**, 317 U. S. 588; **Godchaux v. Estopinal**, 251 U. S. 179; **McCorquodale v. Texas**, 211 U. S. 432; **Cox v. Texas**, 202 U. S. 446.

Nor is the argument that the question was raised at the earliest opportunity available to appellant here. The same insistence now made with respect to the case of **Tennessee Oil Co. v. McCanless**, 178 Tenn. (14 Beeler) 683, could have been made upon the appeal to the Supreme Court of Tennessee because according to the theory of appellant that case was controlling and it was certainly not followed by the trial court. Therefore, such cases as appellant cites making exception to the rule where a litigant had no prior opportunity to assert the claimed Federal immunity are not applicable.

B. Apart from the rule of when the question had to be raised and relied upon, we respectfully submit that the argument that the decision in **Tennessee Oil Co. v. McCanless**, 178 Tenn. (14 Beeler) 683, brings about an unconstitutional discrimination against the taxpayer, is totally without merit.

The **Tennessee Oil Co. v. McCanless**, supra, case and the case at bar, as pointed out by the Supreme Court of the State of Tennessee, involved two completely different and distinguishable factual situations (R. 9). In the Tennessee Oil Company case the exempt agency, the Obion County Board of Education, was doing the storing itself through

its own agent or servant (178 Tenn., at 692). It had leased the tank in which the storing was done so that, as found by the court, the situation was the same as if it had owned the tank in which it stored the gasoline (178 Tenn., at 691). Since it is the storing which is taxed under all the authorities, the exempt agency was exercising the taxable privilege.

In the instant case Esso, as an independent contractor, stored the gasoline as a business for which occupation or privilege a privilege tax was levied against it. It was not an exempt agency and was not acting as the agent or servant of an exempt agency so that the exempt agency, the United States, was not exercising the taxable privilege but the non-exempt agency, Esso, was exercising it.

It is not discrimination under either the Supremacy clause or the Equal Protection clause of the Fourteenth Amendment where the entire circumstances are dissimilar or the classifications based upon reasonable distinctions. **New York Rapid Transit Corp. v. New York**, 303 U. S. 573, at 578 and 579; **Frost v. Corp. Commission**, 278 U. S. 515, at 522.

C. Finally, even if it could be said that the Supreme Court of Tennessee departed from its conclusions in the case of **Tennessee Oil Company v. McCanless**, 178 Tenn. (14 Beeler) 683, such inconsistency would not be a deprivation of the equal protection clause of the Fourteenth Amendment to the Constitution because, as this Court has repeatedly stated, a court is free to depart from precedents if, on further reflection, it thinks them wrong. **Milwaukee El. Ry. and Light Co. v. Wisconsin ex rel.**, 252 U. S. 100 at 105 and 106; **Fidelity and Columbia Trust Co. v. City of Louisville**, 245 U. S. 54, at 59.

CONCLUSION.

We respectfully submit that the judgment of the Supreme Court of the State of Tennessee affirming the judgment of the lower court should in all respects be affirmed by this court:

Respectfully submitted,

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